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HEARINGS

BEFORE THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

JOHN C. TRUESDALE, OF MARYLAND, TO BE A MEMBER OF THE
NATIONAL LABOR RELATIONS BOARD (REAPPOINTMENT)

AUGUST 22 AND SEPTEMBER 5, 1980

Printed for the use of the Committee on Labor and Human Resources

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NOMINATION

FRIDAY, AUGUST 22, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 10:08 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman of the committee) presiding.

Present: Senators Williams, Humphrey, and Hatch.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. We are pleased to come to order.

And let me say we are very pleased this morning to welcome National Labor Relations Board member John Truesdale. Mr. Truesdale has completed 3 years of distinguished service as a member of the National Labor Relations Board, and he has been renominated by the President to continue serving on the Board.

In the course of his 3-year tenure on the Board, Mr. Truesdale has exhibited the sort of independence and fairmindedness that those of us who first supported his appointment fully expected. He has maintained an admirable level of legal scholarship in his opinions in the face of an imposing caseload. And his character, integrity and competence are such that he is liked and respected by both labor and management representatives, regardless of political or legal orientation.

Labor relations law has in the past few years been characterized by a number of bitter controversies which have distressed those of us committed to work for peaceful and amiable resolution of workplace disputes. In this climate, John Truesdale's ability to listen and work with all sides is surely as great an asset as his considerable knowledge and legal talent.

We are fortunate this morning in having a number of experienced labor attorneys and scholars who are willing to aid us in examining Mr. Truesdale's record. I am particularly grateful that Prof. Stephen Goldberg of Northwestern University Law School has agreed to be here this morning to testify concerning Mr. Truesdale's renomination. Professor Goldberg is, of course, a noted labor law scholar. He is also a coauthor of a noted and well-regarded article on representation elections. The thesis of that article was rejected by the Board in a decision in which Mr. Truesdale participated. Yet, Professor Goldberg regards the decision not as a product of a bias toward either side, but of a reasonable disagreement over the effect of certification election campaigns on employees.

Professor Goldberg will, hopefully, by example, counteract the trend toward partisanship in industrial relations which I find most disturbing. Labor law is extraordinarily complex. Those involved in any capacity in this crucial area must allow room for honest disagreement. We must be wary of those who would have us believe that every ruling adverse to their interest or counter to their opinion is the product of bias. I suggest that we do a great disservice both to Mr. Truesdale and the public if we allow partisanship in the nominating process to interfere with the renomination of a Board member with an excellent record of independence and nonpartisanship.

We are very pleased that we have Senator Hatch here to help make this the kind of record we should have in preparation for consideration by the full committee. And then, of course, if reported, to be a record of usefulness to all of the members of the Senate.

Senator HATCH. Thank you, Mr. Chairman, Mr. Truesdale.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Mr. Chairman, the occasion on which our committee meets to consider a Presidential nomination is always a sensitive one, and today's exercise is especially so for myself. I can say at the outset that were we here to consider Mr. Truesdale for membership to almost any other high Federal post for which his unquestionably impressive resume would qualify him, we could probably dispose of this morning's hearing in a fashion that would still leave us an hour and a half of free time before lunch. I, for one, would have liked that.

As it is, however, there are serious questions which must be fully answered, and controversial matters which must be fully discussed. More than any other agency or arm of the Federal Government, the responsibility inherent in the purpose of the National Labor Relations Board can be symbolized in a scale. Its purpose is certainly less activist than judicial. The equilibrium with which it is charged with preserving between the interests of business and labor includes a corollary obligation of the NLRB to prevent either side from achieving industrial dominance. In the broad sense, we are talking here about social justice. In a more immediate sense, we are talking about the decisions affecting the economics, and thus touching upon the lives of every American.

It is not to dislike Mr. Truesdale or to be disrepectful to him that I question so many of the Board's decisions and scrutinize his participation in them. My staff and I have analyzed many of the cases in which Mr. Truesdale participated and have developed a number of questions concerning various of the Board actions and decisions. In posing these during this morning's hearing, I seek to determine whether Mr. Truesdale contributed to, or whether he tried to correct the problems confronting the Board.

These problems are highlighted by the increasing number of appellate courts and labor law practitioners who have come to hold the decisionmaking abilities of the Board in fairly low esteem. Former General Counsel, Mr. John Irving, has said that the growing number of judicial reversals of Board decisions often contain sharp statements of frustration and judicial exasperation which reflect a feeling that the Board is not acting responsibly. In 1976, the appellate court affirmance rate of NLRB decisions was 74 percent. During 1980's fiscal year, with Mr. Truesdale on the Board, the affirmance rate fell to 64.1 percent.

This apparent regression in decisionmaking procedure is reflected in the criticisms being leveled at the Board's more recent actions by many cirtuit court justices. In *Mary Thompson Hospital, Inc.* v. *NLRB* (7th Cir. 1980), the seventh circuit's presiding judge criticized the Board for its flagrant disregard of judicial precedent. In the *NLRB* v. *Wells Fargo* case (1st Cir.1979), the first circuit court characterized a ruling of the NLRB as an abrogation of power that they are not authorized under the Act or cases to exercise. In *NLRB* v. *Eastern Smelting and Refining Corp.* (1st Cir. 1979), the presiding judge was distressed over what he called, the Board's disregard of the principle governing mixed motive cases. And in *Allegheny General Hospital* v. *NLRB* (3rd Cir. 1979), the third circuit court threw up its hands in disgust over the refusal of the Board to follow appellate court precedents, stating: "for the Board to predicate an order of its disagreement with this court's interpretation of a statute is for it to operate outside the law. Such an order will not be enforced."

These are only a sample of the ever-growing reservoir of judicial criticism and displeasure with NLRB decisions made during Mr. Truesdale's tenure to date; decisions which as the ninth circuit court found, are drawn inferences of a narrow and unrealistic nature about today's business/labor society. This court criticism of the more recent NLRB decisions is particularly important. It is so because of the increasing concern shared by many about the Board's apparent difficulty in approaching day-to-day labor problems with an appreciation of the practicalities of industrial relations. It is a concern shared and sharply expressed by former Board Chairman Ed Miller, who said in a recent speech: "There is very little practical industrial relations experience to be found anywhere in the biographies of any of the present Board members or of the top staff of the General Counsel's side of the agency."

It should be observed that there is no member of the NLRB who has any experience representing a management viewpoint in the practice of labor law. The Board is filled with persons not only inclined toward the views of organized labor, but who have spent the bulk of their careers working for the Government. Prominent among these members is Mr. Truesdale himself, during whose tenure has yet, in the opinion of some, to decide in favor of any position considered contrary to that officially representing union interests. These decisions more often than not overturn a longstanding Board precedent, and they are decisions often made over the dissents of two other Board members.

Because these cases are not merely routine affirmances but involve factual findings, it would seem essential that we examine a representative sampling of them this morning. In doing so, the members of this committee will have the opportunity to discover the significance of these last 3 years of NLRB decisionmaking. I hope all us of will seize this opportunity. I hope we will hold Mr. Truesdale to account for his official activities to date, and that we not permit automatic congressional approval of any NLRB nominee before the partiality of decisions made are carefully weighed and evaluated. We owe this to Mr. Truesdale, to the important

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Federal position to which he seeks a full term, and most of all, to the citizens who sent us here and gave us the power to judge on their behalf.

I might also add that I think the Senate has a major responsibility in checking out not only the integrity and the ability of people who are nominated for policymaking positions, but in this particular case, and particularly this case here, is a national policymaking institution that can make the difference whether or not we have labor-management chaos, or a just management-labor relations.

And I think we have got to do more than say well, this is a good guy, and we think we ought to pass it if the President wants it. I think it is time for us in the Senate to quit passing just because they may be nice people, and may have a nice résumé. I think we have to look at what we have done. I think, frankly, we have got to at least bring out some of the things that have to be brought up.

So, Mr. Chairman, I am happy to proceed at this point, and I appreciate your giving me this opportunity to make these few selected remarks.

The CHAIRMAN. Senator Humphrey.

OPENING STATEMENT OF SENATOR HUMPHREY

Senator HUMPHREY. Mr. Chairman, I wish to join my colleagues in welcoming Mr. Truesdale here this morning. I trust that this will be a productive session that will elucidate Mr. Truesdale's views on the operation of the National Labor Relations Board.

The importance of this Board's work cannot be overestimated. It is the Federal agency primarily responsible for insuring fairness between employers and employees. An unprejudiced and balanced approach is essential to the proper functioning of the NLRB. Board members should be mindful that the National Labor Relations Board is not an enforcer for either business or the unions. The Board exists to serve the people—to benefit the country. The welfare of all Americans requires good working conditions and efficient business operations. These conditions and operations require compassion and diligence, but also freedom—freedom from mindless Government meddling—freedom for innovation. NLRB members must walk a fine line.

Of late, I, among others, have grown concerned that the Board is eschewing its duty to the people, and is favoring the self-proclaimed interests of particular organizations. The Board is growing biased to the detriment of employers and employees.

I hope that we will cover this issue at this hearing. I would like to know what Mr. Truesdale thinks of it. I have a number of questions for him concerning his work on the Board, and I look forward to his answers.

The CHAIRMAN. We will now proceed to the statement of Mr. Truesdale.

STATEMENT OF JOHN C. TRUESDALE FOR REAPPOINTMENT AS MEMBER, NATIONAL LABOR RELATIONS BOARD

Mr. TRUESDALE. I missed one statement in the statement that Senator Hatch read, and I wondered if he could repeat that for me? Mr. Truesdale has yet to rule on something——

Senator HATCH. I do not know what you are talking about.

Mr. TRUESDALE. I will get it later. Thank you.

Mr. Chairman, members of the committee, I appreciate your giving me this opportunity to appear before you to answer any questions you may have concerning my qualifications for the position of member of the National Labor Relations Board.

Initially, I would like publicly to thank President Carter, who honors me by nominating me for reappointment to a full term on the Board. If approved by this committee and confirmed by the Senate, I shall continue to strive to live up to the trust and confidence placed in me by the President, the Senate, and by my peers in the labor relations community.

I do not believe it is possible to assess my qualifications without considering both my experience prior to my appointment as a Board member and my performance in that position. Following graduate school and a tour of duty in the Coast Guard, I began my career with the Board in 1948, working as a field examiner in a regional office. There, I dealt directly with employees, employers, and unions. Those 4 years gave me a working knowledge of the Board's functions and the effect of our operations on the rights of the parties who come before us.

Subsequently, I spent 5 years working with the Offices of the General Counsel in Washington, D.C., where I acted as liaison between the General Counsel's Office and the field offices in my jurisdiction, dealing largely with case handling matters. I then left the Board and served in several capacities for the National Academy of Sciences.

I returned to the Board in 1963, when I accepted a position as Associate Executive Secretary. The Executive Secretary's office is principally involved in the administrative management of the Board's judicial affairs, including monitoring the decisionmaking process. It also involves meeting the information requests of parties who await news of the progress of their cases, issuing Board orders, and otherwise furthering the communication and cooperation with parties to cases which is necessary to our administrative and judicial function.

I spent a total of 14 years in the Executive Secretary's office. In 1972, during a Republican administration and at a time when a majority of the Board's members were Republicans, I was appointed Executive Secretary on Chairman Ed Miller's recommendation. In my 5 years as Executive Secretary, I made it my task, among others, to help preserve the Board's reputation for fairness and impartiality in its formal and informal dealings with parties.

Finally, as you know, in 1977 I was appointed to my present position following the departure of member Walther from the Board. In the 3 years that I have served as a member of the Board, I have found my responsibilities to be both weighty and stimulating. I know of no other agency where the interplay of competing interests so strongly mandates a strict insistence on impartiality in administering the enabling statute. This was as true when I was a field examiner, performing the initial investigation of an unfair labor practice charge or processing an election proceeding, as it is now that I share more or less final authority over the results of those field operations.

At the time of my appointment to the Board, many representatives of both labor and management and, indeed, one distinguished member of this committee, said that they had just two words of advice, "Be fair." With that admonition in mind, after taking the oath of office from that gentle founding father of the NLRB, Judge Fahy, I said that:

> The only promises I make are to work as hard as I can, to approach each case with an open mind, and to have my decisions reflect my concern for, and awareness of, the competing and, at times, conflicting rights of the parties we serve.

I have kept those promises, and I reaffirm them now.

I did not promise always to be right, but rather always to try to be fair and impartial. I brought to my new position no omniscience, but only many years of experience in the labor relations field. I believe I also brought a reputation for fairness, integrity and objectivity. Today, after 3 years as a member of the Board, I believe that reputation is intact. I know of no one, either labor or management, who follows the work of the Board who believes otherwise.

This is not to say, of course, that my decisions have never been questioned. Criticism goes with the territory, and all of us on the Board have found one or another of our decisions under fire at some time–if only from our colleagues. Perhaps this is, in part, due to the reality that no one can be sure of absolute truth or complete wisdom in this area. One can argue over the proper policy to be adopted in almost any area of labor law, and one's views in such an argument naturally are colored by the exposure one has had to the competing interests of each party. Because we cannot find an unimpeachable source of wisdom, our principal goal must be to be fair, evenhanded, and open to rational debate in our decisionmaking process.

I share with my colleagues on the Board a strong commitment to the policies of the National Labor Relations Act. I firmly believe that employees, employers and unions have certain rights and responsibilities, and I know that it is the function, the duty of the NLRB to protect those rights and enforce those responsibilities. I believe most particularly in the rights of employees under the act, and especially that employees have the right to choose whether or not to engage in concerted activities. And, of course, I believe, as I am sure the members of this committee do, in the congressionally—articulated and enacted national labor policy:

> To mitigate and eliminate* * * obstructions (to the free flow of commerce)* * * by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

On its surface, this policy seems simple. All the same, 250 volumes of Board decisions, and many thousands of court opinions, are silent testimony to the difficulty in implementing the statutory provisions intended to bring those goals to fruition. In his recent remarks upon the occasion of this committee's hearings to consider his own nomination, Don Zimmerman, the Board's newest member, referred to Justice Frankfurter's seminal decision in the *Sand Door* case (*Carpenters Local 1976* v. *N.L.R.B.*, 357 U.S. 93 (1958)). I would like to reiterate the analysis underlying that decision, for the Justice put his finger on the nub of the problem when he observed that:

The Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled powers of management and labor to further their respective interests.

These same forces and views today result in continual scrutiny of the Board's processes and the performance of each Board member in an attempt to identify the point at which the balance is to be struck. The volume of cases is very great and, in the main, the cases are hotly contested. Yet the Board, I believe, does a splendid job of balancing the interests. Indeed, a distinguished member of this committee has said that "the NLRB is *the best* agency in Government"—his emphasis—and has described the Board "as one of the truly model agencies of Government today." It still is. Those same dedicated public servants, at all levels of the agency, from top to bottom, are still hard at work preserving that hard won-reputation.

Last year, we settled a record number of cases, 84.5 percent of the merit cases. We closed a record number of cases—41,544 unfair labor practice cases and 14,250 election cases. We issued 941 judges' decisions. We issued a record number of contested Board decision, 1,185 unfair labor practice cases and 632 election cases. Finally, the employees of the NLRB did their work swiftly and in accordance with the highest ethical principles. Of course, as I noted earlier, parties understandably can be disappointed in the result in a particular case. All the same, the agency's reputation for fairness and impartiality remains unsullied.

I think I should expand on the statistics to point out that the settled cases, of course, and the great bulk of closing of cases, are carried out by personnel in the field under the supervision of the General Counsel.

Much remains to be done, and I hope to play a role in the agency's continued work. The agency has its problems; it always has and it always will. We need to pay more attention to ways and means of coping with growing caseloads without sacrificing quality, a task made all the more difficult at a time when governmental fiscal austerity is a necessity.

Current criticisms include the charge that the Board does not sufficiently articulate its decisions. That charge is partly true, and the problem, as is true of much else at the Board, is complex. The answers are not simple. In large part, the problem is a function of the Board's increasing caseload. In my 3 years on the Board, I have participated in approximately 2,500 published decisions, and many hundreds of other case actions—ruling on requests for review and various motions, unpublished decisions, and so forth. Too often, there simply is not time to give each case the scrutiny that earlier Boards could give. A complicating factor is the fact that the agency as a whole, like other Federal agencies, must decrease its staff under the current hiring freeze, thereby reducing the available hands to write the articulation of Board rationale.

In these stringent circumstances, the agency must turn its attention to steps that will improve our ability to decide and issue cases with as much speed as is consonant with a fair consideration of the merits. The agency has undertaken some technological improvements in its equipment to hasten the mechanical task of issuing our decisions, and technology may be a partial answer to other bottlenecks as well.

The fact remains, however, that each case must be considered by five very busy people at the top. For the last 8 months, since the departure of member Murphy, this consideration has been by only four members. Until our newest member, Don Zimmerman, can come up to speed, it will soon be three overloaded members doing the work of five. This crushing workload has not resulted in a breakdown of the Board's processes, largely because the Board as a whole has been served very well by its legal staffs who must do the initial legal analysis of the cases. It has been a challenge to do each case justice, and I believe the Board members and their staffs have met this challenge. I welcome the opportunity to continue this work.

At this time, I would be pleased to answer any questions you may have.

The CHAIRMAN. Very fine statement, Mr. Truesdale.

I think we have the light system in place. We should use it. We will be going back and forth, but that will be refreshing.

Senator HATCH. That will be fine.

The CHAIRMAN. All right, Barbara, lights on.

Now, I have what, 20 minutes? Ten.

Mr. Truesdale, first, let me ask you, do you feel confident that your decisions exemplify an evenhanded approach throughout these 3 years of your membership on the Board?

Mr. TRUESDALE. Yes, sir, I do.

The CHAIRMAN. I want to amplify that a little with a question, but I will wait until Senator Hatch returns.

You have a statement on page 4 of your statement that deals with something, but I will come back to that. Let me ask you, have you noticed, in the past few years, any hesitation on the part of the business community to bring their problems before the Board?

Mr. TRUESDALE. None whatsoever, Senator. I have heard, in my travels to meetings, at which both labor and management are in attendance, I have heard no criticism of the Board, nor, I might add self-servingly, of myself.

I believe that it is a very important function of the Board to get out and to find out what the people out there are thinking, what reaction they have to Board decisions. I welcome getting feedback.

I get criticisms of Board decisions, particularly this decision or that decision. Someone will talk to me about that. But as far as any feelings expressed by any member of the management community, that they feel less willing to bring cases before the Board, I have caught no such trend.

The CHAIRMAN. Have you noticed any hesitancy on the part of business or labor to appeal rulings with which they disagree, appeal them to the Federal courts?

Mr. TRUESDALE. None whatsoever. I have not noticed particularly any increase. I do not have the figures at my fingertips, but I certainly have not noticed any decrease in the number of cases taken to the courts.

The CHAIRMAN. Coming back to your statement of an evenhanded approach to the handling of the matters before the Board, page 4 of your statement, you say one can argue over the proper policy to be adopted in almost any area of labor law, and one's views in such an argument naturally are colored by the exposure one has had to the competing interests of each party.

Senator Hatch made a point, the fact that Board members have not been out in the world of business, and associated with either party, business or labor. Your background has been almost exclusively within the Board's activities, has it not?

Mr. **Truesdale**. That is true.

The **Chairman**. You have not had a close association with one or the other side of the equation in labor management relations?

Mr. **Truesdale**. That is true. And I think, in further amplification of that sentence, that in my own particular case—I would not say more than any other Board member, but certainly as much as any Board member—I have been exposed to the competing interests of both sides. And I think that was probably a principal reason for my appointment to the Board in 1977. I was, by the way, the first staff person ever appointed to membership on the Board from Washington. There have been Regional Directors coming to the Board before, Gerry Brown, Ralph Kennedy, "Doc" Penello, but no one I believe ever from Washington.

And I think I was perceived by both sides as a person who understood the problems of each side, and was considered to be an evenhanded person. And I believe that that reputation prevails today.

The **Chairman**. Well, I tell you, I have evidence that what you say has a lot of meaning. And at the proper time, I will include in our record statements which have reached me, and they are for this record, from people who come from the business world, and are deeply involved in the inner actions of labor and management, and deeply involved in the work of the National Labor Relations Board, and all of the procedures, and all the factors of the National Labor Relations Act.

And at the proper time, I will include these, to make sure it is known that your impressions are shared by those who come from the business side.

Mr. **Truesdale**. I do not mean to toot my own horn, too much, but I am fearful no one else will say it. I thought perhaps I should.

The **Chairman**. Well, we have got it here.

Mr. **Truesdale**. Along that line, I would want to say that business people have never felt any hesitance in talking to me about decisions that I have made. And some they have criticized, and some they have praised. They felt free to communicate with me. But I think whereas they might say, John, I cannot agree with that decision, there has never been any question in their minds that I gave it my best shot.

When I came on the Board, people said to me, you know, we do not expect to agree with every decision that you make, but what we do think is that we will get a fair hearing, and that you will give us your best shot. And that is perhaps all that can be asked of any Board member.

The **Chairman**. Exactly.

Some would say that the proper role of a Board member in deciding cases brought before the Board is to stretch the Labor Relations Act to its outermost limits, and maybe beyond. Others would say that the proper role of a Board member is to determine cases strictly in conformance with the law, and with the proper and due regard to previously decided cases.

Could you give us what you believe is the proper philosophy of a Board member in deciding cases brought before the Board?

Mr. TRUESDALE. Well, I certainly do not believe in stretching the law to its outer limits. I do not approach each case from the point of view of how can I pick up on prior decisions and constantly push forward.

I do believe, however, in holding the line, let us say, on the other end of the spectrum against people who are trying to push back where the law is.

With respect to prior precedents, I feel strongly that a prior precedent is, of course, important. We do have to pay attention and give proper deference to decisions of the Supreme Court and the court of appeals, and prior Board decisions.

But we are put on the Board by the President to give our own best judgments at to the law, and facts of the cases, at the time we are considering the case. So it is a question in the case of balancing the proper weight to be given to prior decisions, and to decisions of the courts, and to our own best judgment as to what the law is today.

I think in this connection–I suppose we will get into some of these cases later—but I have not the slightest doubt that there are some cases reflecting the current law of the Board today that if someone—well, let us just take the *Gould Corp.*, for example. Mr. Penello and I dissented in the *Gould Corp.* Chairman Fanning, Member Jenkings and Member Murphy were the majority.

I have not the slightest doubt that if someone, whom Senator Hatch would approve were to come on the Board, he or she would join with Member Penello and me to move with dispatch to reverse *Gould Corp.* That person, I am sure, would bring to the Board his or her own feeling about the weight that should be given to that case as prior precedent, that he or she should not feel that he or she should come on the Board merely to rubberstamp the decisions of prior Board members. And I feel that way myself.

The CHAIRMAN. We are on yellow. Let me see if I have time for just one question before turning to any opening statement that Senator Humphrey might have.

Your participation in the decision of *General Knit* has been a general controversy. Can you tell us why campaign misrepresentation can affect elections?

Mr. TRUESDALE. I do not feel the slightest bit defensive about *General Knit.* I think that *Shopping Kart* was a wrong decision. It overruled 17 years of precedents. I believe my decision in *General Knit,* and also a speech I made on the subject—which, if permitted, I would like to have introduced into the record—explains why I thought the study performed by my good friend Professor Goldberg was flawed.

I do not believe that employees can be expected in particular situations to understand that what they have heard is a misrepresentation. They do not have the facts in that kind of a situation at their command. I do not believe in elections won by an election eve bombshell, in the government issuing to parties to cases what are, in effect, licenses to lie.

I think that for the Board to protect its election processes, it is necessary for it to monitor under the very narrow circumstances of *General Knit* election campaign propaganda by both sides.

And I must say, Senator Williams, the only criticism I got from *General Knit* came from unions. I have not heard one criticism from management. Unions were unhappy about that decision, but I felt my vote was right.

[The following was received for the record:]

FROM *GENERAL SHOE* TO *GENERAL KNIT*: A RETURN TO *HOLLYWOOD CERAMICS*

by

John C. Truesdale

First, I would like to thank the Federal Bar Association, the New York State Bar Association, and the Bureau of National Affairs for inviting me to participate in this seminar. I am pleased to be included with such a distinguished group of speakers.

Secondly, I would like to apologize to the panelists and audience here for the absence of an outline of my speech today. It was not possible, however, to give you an advance digest of my topic since it turns on a major decision which issued only last week. In a decision issued December 6, 1978 in *General Knit of California, Inc.*[1] a Board majority, including myself, Chairman Fanning, and Member Jenkins, has overruled *Shopping Kart*,[2] and returned to the rule of *Hollywood Ceramics*.[3] For those who may think I am speaking in code, let me explain. From 1962 to 1977 the Board had a

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Mr. Truesdale is a Member of the District of Columbia and Maryland Bars and a graduate of Grinnell College (A.B.), Cornell University (M.S.I.L.R.), and Georgetown University (J.D.). He has been a Member of the National Labor Relations Board since October 1977.
He is pleased to acknowledge the assistance of Meredith Wellington, a lawyer on his staff, in the preparation of this paper.

1/ 239 NLRB No. 101 (Chairman Fanning, Members Jenkins and Truesdale; Members Penello and Murphy dissenting separately).

2/ *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977).

3/ *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962).

policy — announced in Hollywood Ceramics -- of setting aside the results of a Board-conducted election where one party made a misrepresentation — and I quote --

> "which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

The purpose of this rule was to insure employee free choice and preserve the integrity of the electoral process.

In the 1977 Shopping Kart case, however, by a 3-2 majority in which one member concurred with her own separate standard, the Board reversed Hollywood Ceramics and held that it would no longer set an election aside solely because of misleading campaign statements or outright misrepresentations of fact unless a party had engaged in deceptive practices which improperly involved the Board and its processes or the use of forged documents.[4/] With the caveat in Member Murphy's concurrence that she would also set aside an election where a party had made an "egregious mistake of fact," the Board majority in Shopping Kart essentially decided that the Board should no longer interest itself in "the truth or falsity of the parties' campaign statements," but left it to the employees themselves to sort out the truth or falsity of all the statements made in an election campaign.

[4/] Shopping Kart Food Market, Inc., supra (Members Penello and Walther; then-Chairman Murphy concurring; then-Member Fanning and Member Jenkins dissenting).

In General Knit the Board now returns to its long-standing policy of setting aside an election where the result may reasonably have been affected by a substantial and material misrepresentation during the critical pre-election campaign period. As a member of the majority, I welcome the reestablishment of this doctrine as I firmly believe that it has, over the years, maintained the integrity of the Board's electoral process, and has preserved employee free choice. It has done so by establishing a boundary beyond which the parties understand they cannot tread without a significant risk that their success at the polls will be vitiated by properly filed post election objections.

I recognize, however, as do my colleagues in the majority in the General Knit decision itself, that the review of campaign rhetoric as it concerns substantial misrepresentations in the pre-election dialogue, has been a subject of controversy in recent years. I would like then to discuss with you the significance of the General Knit decision in terms of what course I see that the Board now intends to follow under it, and whether this course differs from that followed under Hollywood Ceramics. Finally, I would address the critics of review of misrepresentation.

First, the review of misrepresentation during Board campaigns should be put into historical perspective in terms of the Board's overall responsibility to insure free and fair elections and employee free choice under Sections 7 and 9 of the Act. In 1948 the Board issued a decision in General Shoe Corporation[5/] wherein it established a standard of "laboratory conditions" for a Board election:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low...the requisite laboratory conditions are not present and the experiment must be conducted over again.

Thus, the Board held that "conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." Applying the standard announced in General Shoe, the Board in that case overturned the election because the employer had called employees into his office to deliver an anti-union speech and because he had sent his foremen into employees' homes to deliver the anti-union message, even though, the Board found such conduct did not violate §8(a)(1) of the Act.

Then, in 1962, the Board issued Dal-Tex Optical Company, Inc.,[6/] which, like General Shoe, established further campaign standards in stated areas involving preelection conduct including speech. There, the Board held that it would overturn an election whenever an unfair labor practice was committed during the critical pre-election period, on the theory that

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[5/] 77 NLRB 124 (1948).
[6/] 137 NLRB 1782 (1962).

conduct violative of the various subsections of Section 8 is, a fortiori, conduct which interferes with the employees' exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is normally considerably more restrictive than the test for violations of §8(a)(1).[7] In Dal-Tex, the Board invalidated the election on the basis of "the entire content of the Employer's speeches, [which] taken as a whole, with the clear threats and the implied anticipatory refusal to bargain ... generated an atmosphere of fear of economic loss and complete hostility to the Union..."[8]

Hollywood Ceramics, issued the same year as Dal-Tex, dealt with only one kind of conduct -- misrepresentations. While this conduct fell short of constituting a violation of Section 8(a)(1), the Board concluded that it interfered with "laboratory conditions." As the Board said in Hollywood Ceramics:

> The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of employees. [Footnote omitted.] One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election." 140 NLRB at 223.

In Hollywood Ceramics the Board emphasized "that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees." The Board recognized the right of the parties to wage a "free and vigorous campaign with all the normal tools of electioneering," and also stated that "exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside elections." It seems to me, that this aspect of Hollywood Ceramics -- that the Board would only look to misrepresentations which involve a substantial departure from the truth -- has been overlooked too often since Hollywood Ceramics issued.

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[7] 137 NLRB at 1787 [footnote omitted].
[8] Ibid.

The narrow focus of the Board's inquiry was reemphasized, however, in Modine Manufacturing,[9] wherein the Board attempted a broad explanation of how it intended to enforce the Hollywood Ceramics standard. As a procedural matter, the Board stated that the objecting party had the responsibility of presenting sufficient evidence to establish a prima facie case of misrepresentation before the Board would hold a hearing on the objections. As a substantive matter, the Board reiterated its view that the misrepresentation must be a substantial departure from the truth, and that the Board would not require complete accuracy in campaigning:

> We do not wish to have unrealistic standards, or insist upon such improbable purity of word and deed that we will obstruct or delay our administrative task of conducting elections in so high a number of cases that any hard-fought campaign will almost inevitably result in our elections being invalidated.
>
> Nor do we believe it wise to direct hearings as a matter of course in any case in which misrepresentations are alleged to have been made, and thus regularly delay the intended effect of our elections and substantially direct the resources of this Agency from the host of other pressing matters demanding our attention.

I am in accord with the Modine position, for I believe it fully reflects the spirit and letter of the original Hollywood Ceramics doctrine.

So too, when General Knit states that we are returning to the rule in Hollywood Ceramics -- it means just that -- a return to the original doctrine. Speaking at least for myself, the Board starts with a clean slate. Under General Knit, as under Hollywood Ceramics, no employer or union has a license to lie with impunity. Rather, we are reaffirming the "laboratory conditions" standard announced in General Shoe and expanded upon in Dal-Tex.

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[9] 203 NLRB 527 (1973), enfd, 500 F. 2d 914 (8th Cir. 1974).

This does not mean, however, that the Board will overturn the election result every time any fact is misrepresented during the pre-election period. To the contrary, the misrepresentation must be one which may reasonably be expected to have a significant impact on the election. Isn't this what "substantial" and "material" are all about?

"Significant impact" should be measured by all of the circumstances in a case. Some of the more obvious yardsticks include: (1) the subject being addressed — wages, benefits, and profits, for example, are obviously subjects which are of great importance to the election; therefore, a misrepresentation with regard to them would be more likely to affect the votes; (2) the timing of the statement; and (3) the degree to which the employees would be likely to rely on the accuracy of the statement — a factor which is also related to the extent to which the information is uniquely within the knowledge of the speaker.

The Second Circuit similarly summarized the traditional Board tests for determining impact as follows: (1) the misrepresentation was of a material fact (and involved a substantial departure from the truth); (2) the other party did not have time to reply; (3) the misrepresentation comes from a party in an authoritative position to have special knowledge of the facts; and (4) the employees lacked the independent knowledge with which to evaluate the statement.[10]

It is of critical importance that the closer the election the more that the parties should strive to avoid misrepresentation and temper their words accordingly. Otherwise, we are left with election by bombshell, wherein the parties save their biggest guns for the end of the campaign, hoping to attack the other party at a time when there will not be enough time to respond so as to neutralize the effects of the bombshell. In my view, this kind of conduct is anathema to employee free choice and to the maintenance of the integrity of the Board's electoral process. That is why, although I agree that the Board's view of misrepresentations should be circumscribed to permit free and vigorous campaigning, I believe that some regulation of misrepresentation is necessary. As the Board said in General Shoe:

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[10] Bausch & Lomb, Inc. v. N.L.R.B., 451 F.2d 873 (C.A. 2, 1971).

> Because we cannot police the details surrounding every election, and because we believe in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. The question is one of degree.

And there is another reason. If the employer goes to the bargaining table, assuming that his employees have been bamboozled by union lies and material misrepresentations, he is more likely to bargain begrudgingly with the union, since he will question whether the union fairly represents his employees. Similarly, if the union loses, and some employees believe that "they wuz robbed," their faith in the NLRB and the statute is shaken. On the other hand, when both parties and the voters believe that the election was fair and the results represent the free choice of the voters, then stability of collective bargaining and industrial harmony are fostered.

Opponents of *Hollywood Ceramics*, however, raise several arguments as to why *Hollywood Ceramics* should not be revived. First, they argue that the standard is vague and wavering, and therefore it has not and cannot be evenly enforced. Secondly, they argue that the administration of the *Hollywood Ceramics* cases is burdensome, and it is merely a tool for delaying the obligation to bargain. Thirdly, — and this, in my view, is the most important and potentially harmful and seductive argument — they argue that employer and union campaigning has no effect on the employees and therefore it is a waste of the Board's resources to place any restrictions, with certain extremely limited exceptions, on what the parties can say.

1. Standard is Vague and Wavering, Inconsistent Results

Some scholars in the field and the *Shopping Kart* majority believe that *Hollywood Ceramics* should be abandoned because, in this view, the standard is vague and unworkable, and its application has led to inconsistent results. I have two responses to this criticism. First, I do not believe that the standard is vague and unworkable. Merely because it requires the Board to weigh a number of factors does not mean *a fortiori* that the results overall will be inconsistent. In my view, the Board should not run from the task of weighing the reasonable effect of misrepresentation simply because that task is difficult. We are called upon daily to perform the same kinds of weighing in deciding cases under other sections of the Act. As Mr. Justice Frankfurter observed, the statute compels the Board and the courts to draw lines "more nice than obvious."[11]

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[11] I paraphrase his statement in *Electrical Workers Local 761* v. *NLRB*, 366 U. S. 667, 674 (1961).

I do not shrink from this task in this area any more than for any other area.

Secondly, as I mentioned earlier, the Board now has an opportunity to begin from ground zero and carefully scrutinize all cases to ensure as best possible consistency of result. This does not mean that our critics or the parties involved will always agree with our result. I've been a Board Member long enough now to expect that — but it does mean that the cases can reflect a consistency of approach and recognition that the same factors are important. As the majority said in General Knit in response to this criticism:

> If there have been any inconsistencies in the results of the cases we have considered, these have stemmed from judgmental differences as to the reasonable effect of a misrepresentation on the electorate, not from any fundamental difference in standards or from any desire to regulate the conduct of one party more closely than that of another. In any event, our primary focus is on the future application of this standard and not on the past. It is our goal to adhere strictly to the standard articulated in Hollywood Ceramics and to apply that standard equally to both sides, while still allowing the parties the opportunity to campaign vigorously for their particular positions.

2. Administratively Burdensome - Tool for Delay

Secondly, critics assert that the Hollywood Ceramics rule is administratively burdensome and that it is merely used by cynical employers as a tool for delaying their obligation to bargain. Indeed, some seem to believe that the regional offices are too busy to be burdened with investigating election objections based on alleged campaign misrepresentations. I hope their desire to relieve the regions of this administrative burden stems from a fundamental conviction that misrepresentations, as a class, do not affect elections and not simply from a desire to streamline regional operations. For if the latter is the case, then it seems to me that those who take this position are simply tailoring their principles to fit the Board's caseload. Yet, in my view, the Board should not base a decision on its ultimate effect on lessening our caseload. Such a consideration could result in the gradual abandonment of enforcement of the Act.

As for Hollywood Ceramics being used by employers as a tool for delay, the Board runs this risk by permitting objections to elections at all, since any party may frivolously make objections and the employer, having lost his cause before the Board may then pursue his rights through the court of appeals. The fact is, however, that very few employers engage in such delaying conduct and that in the vast majority of cases, even while Hollywood Ceramics was the law, a union will be certified, and bargaining will commence in a short while after the election. Thus, for example, in fiscal 1976 — the last full year in which Hollywood Ceramics was still the law, the Board conducted 8,899 elections; in 7,982, or nearly 90%,neither side challenged the validity of the results through objections. Of those cases where objections were filed, only 30% involved Hollywood Ceramics allegations, and of these only 9 cases went to the courts of appeals. Thus, only 3.4% of the elections were in any way delayed by the Hollywood Ceramics doctrine, while a minute .1% of the cases experienced the delay attendant to a court appeal or enforcement. Unfortunately, we have no way of measuring the extent to which the existence of Hollywood Ceramics deterred parties from engaging in misrepresentation, but I believe the deterrent effect to be substantial, and certainly to be worth some delay in the small number of cases I have just mentioned.

3. The Effect of campaigning - The Getman, Goldberg, & Herman Study

Finally, we come to the most controversial, and to me, the most interesting question: Does campaigning by either side affect how the employees vote so that the election result could be affected by campaign misrepresentations? Based on my years of experience at the Board, I answer that question with an emphatic yes. That does not mean that I believe that campaigning is determinative in every election, but I do believe it plays an important role in the vast majority, just as I believe that candidates' campaigning makes a difference in local and national elections.

Indeed, the Board agreed with this view from at least 1948 (when General Shoe issued) until 1977 (Shopping Kart). But, in Shopping Kart the Board decided, based largely on one limited study, that the parties' campaigning did not play a significant part in the employees' decision how to vote and that therefore regulation of misrepresentation was not necessary.

Two things about the Shopping Kart decision were extremely troublesome to me. First, the heavy reliance on the study by Getman, Goldberg, and Herman, Union Representation Elections: Law & Reality.[12]

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[12] The study was published in book form by the Russell Sage Foundation. Getman and Goldberg originally published their findings in "The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation," 28 Stanford Law Review 263 (1976).

Secondly, the implications of the decision for other areas of our administration of the electoral process.

In General Knit the majority discusses in detail its disagreement with Shopping Kart's emphasis and reliance on the Getman, Goldberg, and Herman study. Briefly, the General Knit majority notes that even the authors (who ultimately concluded — on the basis of 81 percent of the voters studied — that campaigning had little effect on voter choice) found, for 5% of the voters, a relationship between their vote and their familiarity with the union campaign. The 5% were from the pool of undecided and "switchers."[13] The Board majority extrapolates from that, and notes that an argument can be made that the votes of all 19% of the undecided and switchers were affected either by the parties' campaigning or the lack thereof. Moreover, the 19% were critical in 9 of the 31 elections studied. Thus, contrary to the authors, the campaigning, at least by the union, does appear to be important. But, in fact, the authors also recognize that the mere existence of an employer campaign could be significant. This is so since all 31 elections were vigorously contested by the employers, and the union won only 8, or about 35%, a percentage far below their nationwide win ratio which at that time was 50%.[14]

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[13] Employees who were inclined to vote one way at the outset of the campaign and then changed their minds sometime later.

[14] In 2 of the 8 the votes of the undecided and switchers were critical.

I have other criticisms not contained in the General Knit decision. First, the authors' conclusion that campaigning has little effect on the election outcome, was, in their view, buttressed by the voters' lack of familiarity with the vast majority of the issues raised in the campaign. But, as former NLRB Chairman Ed Miller pointed out in his critique of the study,[15] that finding is neither surprising to an experienced observer, nor necessarily supportive of the authors' ultimate conclusion. For the experienced campaigner understands that only a few issues are important to the voters, and he/she will hammer away at them. Thus, if the leaflets raise 20 issues, but the voters remember only 1, that does not mean that voters' decisions were not influenced by the parties' campaign dialogue on the one issue. Moreover, while campaigning on that issue may make some voters change their minds, its more important function may be to insure that the party does not lose the votes it has. This function is extremely important in an industrial election where on the one hand, the employer has the advantage of having always been present in the plant to explain his position to the employees, while on the other hand, the union has the advantage of being able to file its petition at a time when a union believes its support is at a peak. And, indeed, the study found that in the elections that the unions lost, the average loss in union support from card signing to vote was 35%, whereas, when it won, the average change was only 4%. The authors cannot explain this statistic, but, in my view, the answer would lie in the relative effectiveness of the parties' campaigns.

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[15] Edward B. Miller, A. H. Raskin, Patricia Eames, Robert J. Flanagan, "Four Perspectives on Union Representation Elections: Law and Reality," 28 Stanford L. Rev. (1976).

I also agree with at least one of the criticisms raised by Patricia Eames, an associate professor of law at Vanderbilt, and former general counsel to the Textile Workers. While she termed the study "extremely important," she criticized it because the authors only studied the voter attitudes as of the weeks immediately preceding the election.[16] By then, a lot of campaigning may have already occurred so that it is difficult to conclude, as the authors did, that 81% had made their decision by the time of the first interview, on the basis of pre-formed attitudes. The campaigning, when it existed, may well have made a difference.

I am not, however, only disturbed by the authors' methodology, but also by the direction in which Board decisions would go if the Board were to rely completely on the conclusions the authors drew from their data. Thus, the study did not, as Shopping Kart would suggest, have repercussions only in regard to the Board's review of misrepresentation. A major part of its findings dealt with the Board's review of threats and coercion under Section 8(a)(1) and individual discharges under Section 8(a)(3) and whether an election should be set aside on the basis of this kind of conduct. The study concluded that coercive speech under §8(a)(1) and most coercive conduct under the other sections, had no effect on the voters and that, therefore, the Board should not set aside elections by reason of such conduct.

I am particularly distressed at this recommendation, although

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[16] Ibid.

I do not believe that the Board as presently constituted -- including those who dissent in General Knit -- would support such a result. Yet it would appear that such a result might flow from the Shopping Kart rationale, for if misrepresentations can be evaluated by the electorate, why not threats, interrogations, or even discriminatory discharges.[17] Indeed, one court - the Ninth Circuit - has suggested in a very recent decision that it would, in light of the result of the study, favor a rule whereby an election was no longer set aside because of threats.

> It is tempting to us to seize upon the study and go farther than the Board did in Shopping Kart, holding that we will no longer sustain orders setting aside elections, or set aside orders sustaining them, in cases of threats as well as in cases of claimed misrepresentations in election campaigns. However, we resist the temptation because it is the Board, not the courts, that is presumed to be expert in this field.[18]

I believe this decision to be a bellwether of the direction that the law might have taken had Shopping Kart remained in effect. And, had the Board continued to relax its standard, it seems inevitable to me that certain employers and unions would have taken advantage of the relaxed standards to engage in campaigns based on gross distortions, innuendo, and veiled and not-so-veiled threats -- more aimed at coercing voters than persuading them thoughtfully. In my view, however, General Knit will prevent any deterioration in the level of campaigning, and once again assure the continued integrity of the Board's electoral processes.

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[17] Of course, the authors of the study argue that employees are as "coerced" by employer conduct which the Board did not find to violate §8(a)(1) and (3) as they are by violative conduct, and, therefore, any regulation is pointless. I do not agree. If the system is imperfect, that does not justify junking it in exchange for an electoral free-for-all in which no employees are protected from coercion.

[18] Oshman's Sporting Goods, Inc. v. N.L.R.B., ____ F. 2d. ____, slip op., p. 5 (9th Cir., Nov. 20, 1978.)

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JOHN C. TRUESDALE
Member, National Labor Relations Board

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From General Shoe to General Knit: A Return to Hollywood Ceramics*

By JOHN C. TRUESDALE

Mr. Truesdale is a Member of the National Labor Relations Board.

IN A DECISION ISSUED December 6, 1978, in *General Knit of California, Inc.*,[1] a Board majority, including myself, Chairman Fanning, and Member Jenkins, has overruled *Shopping Kart*,[2] and returned to the rule of *Hollywood Ceramics*.[3] For those who may think I am speaking in code, let me explain. From 1962 to 1977 the Board had a policy—announced in *Hollywood Ceramics*—of setting aside the results of a Board-conducted election where one party made a misrepresentation "which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election." The purpose of this rule was to insure employee free choice and preserve the integrity of the electoral process.

In the 1977 *Shopping Kart* case, however, by a 3-2 majority in which one member concurred with her own separate standard, the Board reversed *Hollywood Ceramics* and held that it would no longer set an election aside solely because of misleading campaign statements or outright misrepresentations of fact unless a party had engaged in deceptive practices which improperly involved the Board and its processes or the use of forged documents.[4] With the *caveat* in Member Murphy's concurrence that she would also set aside an election where a party had made an "egregious mistake of fact," the

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* Adapted from a speech before the Fifth Annual Labor Law Institute. Mr. Truesdale is pleased to acknowledge the assistance of Meredith Wellington, a lawyer on his staff, in the preparation of this paper.

[1] 239 NLRB No. 101, 1978-79 CCH NLRB ¶ 15,137 (Chairman Fanning, Members Jenkins and Truesdale; Members Penello and Murphy dissenting separately).

[2] *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), 1977-78 CCH NLRB ¶ 18,048.

[3] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962), 1962 CCH NLRB ¶ 11,849.

[4] *Shopping Kart Food Market, Inc., supra* (Members Penello and Walther; then-Chairman Murphy concurring; then-Member Fanning and Member Jenkins dissenting).

Board majority in *Shopping Kart* essentialy decided that the Board should no longer interest itself in "the truth or falsity of the parties' campaign statements," but left it to the employees themselves to sort out the truth or falsity of all the statements made in an election campaign.

In *General Knit*, the Board now returns to its long-standing policy of setting aside an election where the result may reasonably have been affected by a substantial and material misrepresentation during the critical preelection campaign period. As a member of the majority, I welcome the reestablishment of this doctrine, as I firmly believe that it has, over the years, maintained the integrity of the Board's electoral process and has preserved employee free choice. It has done so by establishing a boundary beyond which the parties understand they cannot tread without a significant risk that their success at the polls will be vitiated by properly filed post-election objections.

I recognize, however, as do my colleagues in the majority in the *General Knit* decision itself, that the review of campaign rhetoric as it concerns substantial misrepresentations in the pre-election dialogue has been a subject of controversy in recent years. I would like then to discuss with you the significance of the *General Knit* decision in terms of what course I see that the Board now intends to follow under it and whether this course differs from that followed under *Hollywood Ceramics*. Finally, I would address the critics of review of misrepresentation.

Historical Perspective

First, the review of misrepresentation during Board campaigns should be put into historical perspective in terms of the Board's overall responsibility to insure free and fair elections and employee free choice under Sections 7 and 9 of the Act. In 1948, the Board issued a decision in *General Shoe Corporation*[8] wherein it established a standard of "laboratory conditions" for a Board election. "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low . . . the requisite laboratory conditions are not present and the experiment must be conducted over again."

Thus, the Board held that "conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice." Applying the standard announced in *General Shoe*, the Board in that case overturned the election because the employer had called employees into his office to deliver an anti-union speech, and because he had sent his foremen into employees' homes to deliver the anti-union message, even though the Board found such conduct did not violate § 8(a)(1) of the Act.

Then, in 1962, the Board issued *Dal-Tex Optical Company, Inc.*,[9] which, like *General Shoe*, established further campaign standards in stated areas involving preelection conduct, including speech. There, the Board held that it would overturn an election whenever an unfair labor practice was committed during the critical preelection period, on the theory that conduct violative of the various subsections of Section 8 is, *a fortiori*, conduct which interferes with the employees' exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the "laboratory conditions" for an election is normally considerably more restrictive than the test for violations of § 8(a)(1).[7] In *Dal-Tex*, the Board invalidated the election on the basis of "the entire content of the Employer's speeches, [which] taken as a whole, with the clear threats and the implied anticipatory refusal to bargain . . . generated an atmosphere of fear of economic loss and complete hostility to the Union . . . ."[8]

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[8] 77 NLRB 124 (1948).

[9] 137 NLRB 1782 (1962), 1962 CCH NLRB ¶ 11,202.

Hollywood Ceramics

Hollywood Ceramics, issued the same year as *Dal-Tex*, dealt with only one kind of conduct—misrepresentations. While this conduct fell short of constituting a violation of Section 8(a)(1), the Board concluded that it interfered with "laboratory conditions." As the Board said in *Hollywood Ceramics:* "The Board seeks to maintain, as closely as possible, laboratory conditions for the exercise of this basic right of employees [Footnote omitted]. One of the factors which may so disturb these conditions as to interfere with the expression of this free choice is gross misrepresentation about some material issue in the election."

In *Hollywood Ceramics*, the Board emphasized "that absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees." The Board recognized the right of the parties to wage a "free and vigorous campaign with all the normal tools of electioneering" and also stated that "exaggeration, inaccuracies, half-truths, and name calling, though not condoned, will not be grounds for setting aside elections." It seems to me that this aspect of *Hollywood Ceramics* (that the Board would only look to misrepresentations which involve a *substantial* departure from the truth) has been overlooked too often since *Hollywood Ceramics* issued.

Modine Manufacturing

The narrow focus of the Board's inquiry was reemphasized, however, in *Modine Manufacturing*,[9] wherein the Board attempted a broad explanation of how it intended to enforce the *Hollywood Ceramics* standard. As a procedural matter, the Board stated that the objecting party had the responsibility of presenting sufficient evidence to establish a *prima facie* case of misrepresentation before the Board would hold a hearing on the objections. As a substantive matter, the Board reiterated its view that the misrepresentation must be a substantial departure from the truth, and that the Board would not require complete accuracy in campaigning.

"We do not wish to have unrealistic standards, or insist upon such improbable purity of word and deed that we will obstruct or delay our administrative task of conducting elections in so high a number of cases that any hard-fought campaign will almost inevitably result in our elections being invalidated. Nor do we believe it wise to direct hearings as a matter of course in any case in which misrepresentations are alleged to have been made, and thus regularly delay the intended effect of our elections and substantially direct the resources of this Agency from the host of other pressing matters demanding our attention." I am in accord with the *Modine* position, for I believe it fully reflects the spirit and letter of the original *Hollywood Ceramics* doctrine.

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[7] 137 NLRB at 1787 [footnote omitted].

[8] *Ibid.*

[9] 203 NLRB 527 (1973), enfd. 500 F. 2d 914 (8th Cir. 1974), 1973 CCH NLRB ¶ 25,352.

So too, when *General Knit* states that we are returning to the rule in *Hollywood Ceramics,* it means just that, a return to the original doctrine. Speaking at least for myself, the Board starts with a clean slate. Under *General Knit,* as under *Hollywood Ceramics,* no employer or union has a license to lie with impunity. Rather, we are reaffirming the "laboratory conditions" standard announced in *General Shoe* and expanded upon in *Dal-Tex*.

Significant Impact

This does not mean, however, that the Board will overturn the election result every time any fact is misrepresented during the preelection period. To the contrary, the misrepresentation must be one which may reasonably be expected to have a significant impact on the election. Isn't this what "substantial" and "material" are all about?

"Significant impact" should be measured by all of the circumstances in a case. Some of the more obvious yardsticks include: (1) the subject being addressed—wages, benefits, and profits, for example, are obviously subjects which are of great importance to the election, therefore, a misrepresentation with regard to them would be more likely to affect the votes; (2) the timing of the statement; and (3) the degree to which the employees would be likely to rely on the accuracy of the statement—a factor which is also related to the extent to which the information is uniquely within the knowlege of the speaker.

The Second Circuit similarly summarized the traditional Board tests for determining impact as follows: (1) the misrepresentation was of a material fact (and involved a substantial departure from the truth); (2) the other party did not have time to reply; (3) the misrepresentation comes from a party in an authoritative position to have special knowledge of the facts; and (4) the employees lacked the independent knowledge with which to evaluate the statement.[10]

It is of critical importance that the closer the election, the more the parties should strive to avoid misrepresentation and temper their words accordingly. Otherwise, we are left with election by bombshell, wherein the parties save their biggest gun for the end of the campaign, hoping to attack the other party at a time when there will not be enough time to respond so as to neutralize the effects of the bombshell. In my view, this kind of conduct is anathema to employee free choice and to the maintenance of the integrity of the Board's electoral process. That is why, although I agree that the Board's view of misrepresentations should be circumscribed to permit free and vigorous campaigning, I believe that some regulation of misrepresentation is necessary.

As the Board said in *General Shoe:* "Because we cannot police the details surrounding every election, and because we believe in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. The question is one of degree."

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[10] *Bausch & Lomb, Inc. v. N. L. R. B.,* 451 F. 2d 873 (CA-2, 1971), 66 LC ¶ 12,150.

And there is another reason. If the employer goes to the bargaining table, assuming that his employees have been bamboozled by union lies and material misrepresentations, he is more likely to bargain begrudgingly with the union, since he will question whether the union fairly represents his employees. Similarly, if the union loses, and some employees believe that "they wuz robbed," their faith in the NLRB and the statute is shaken. On the other hand, when both parties and the voters believe that the election was fair and the results represent the free choice of the voters, then stability of collective bargaining and industrial harmony are fostered.

Opponents of *Hollywood Ceramics*, however, raise several arguments as to why *Hollywood Ceramics* should not be revived. First, they argue that the standard is vague and wavering, and therefore it has not and cannot be evenly enforced. Secondly, they argue that the administration of the *Hollywood Ceramics* cases is burdensome, and it is merely a tool for delaying the obligation to bargain. Thirdly,—and this, in my view, is the most important and potentially harmful and seductive argument—they argue that employer and union campaigning has no effect on the employees and therefore it is a waste of the Board's resources to place any restrictions, with certain extremely limited exceptions, on what the parties can say.

Inconsistent Results

Some scholars in the field and the *Shopping Kart* majority believe that *Hollywood Ceramics* should be abandoned because the standard is vague and unworkable, and its application has led to inconsistent results. I have two responses to this criticism. First, I do not believe that the standard is vague and unworkable. Merely because it requires the Board to weigh a number of factors does not mean that the results overall will be inconsistent. In my view, the Board should not run from the task of weighing the reasonable effect of misrepresentation simply because that task is difficult. We are called upon daily to perform the same kinds of weighing in deciding cases under other sections of the Act. As Mr. Justice Frankfurter observed, the statute compels the Board and the courts to draw lines "more nice than obvious."[11] I do not shrink from this task in this area any more than for any other area.

Secondly, as I mentioned earlier, the Board now has an opportunity to begin from ground zero and carefully scrutinize all cases to ensure the best possible consistency of result. This does not mean that our critics or the parties involved will always agree with our result. I've been a Board Member long enough now to know that. But it does mean that the cases can reflect a consistency of approach and recognition that the same factors are important.

As the majority said in *General Knit* in response to this criticism: "If there have been any inconsistencies in the results of the cases we have considered, these have stemmed from judgmental differences as to the reasonable effect of a misrepresentation on the electorate, not from any fundamental difference in standards or from any desire to regulate the conduct of one party more closely than that of another. In any event, our primary focus is on the future application of this standard and not on the past. It is our goal to adhere strictly to the standard articulated in *Hollywood Ceramics* and to apply that standard equally to both sides, while still allowing the parties the opportunity to campaign vigorously for their particular positions.

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[11] I paraphrase his statement in *Electrical Workers Local 761 v. NLRB*, 366 U. S. 667, 674 (1961), 42 LC ¶ 16,966.

Tool for Delay

Secondly, critics assert that the *Hollywood Ceramics* rule is administratively burdensome and that it is merely used by cynical employers as a tool for delaying their obligation to bargain. Indeed, some seem to believe that the regional offices are too busy to be burdened with investigating election objections based on alleged campaign misrepresentations. I hope their desire to relieve the regions of this administrative burden stems from a fundamental conviction that misrepresentations, as a class, do not affect elections and not simply from a desire to streamline regional operations. For if the latter is the case, then it seems to me that those who take this position are simply tailoring their principles to fit the Board's caseload. Yet, in my view, the Board should not base a decision on its ultimate effect on lessening our caseload. Such a consideration could result in the gradual abandonment of enforcement of the Act.

As for *Hollywood Ceramics* being used by employers as a tool for delay, the Board runs this risk by permitting objections to elections at all, since *any party* may frivolously make objections and the employer, having lost his cause before the Board may then pursue his rights through the court of appeals. The fact is, however, that very few employers engage in such delaying conduct and that in the vast majority of cases, even when *Hollywood Ceramics* was the law, a union will be certified and bargaining will commence in a short while after the election.

For example, in fiscal 1976 (the last full year in which *Hollywood Ceramics* was still the law), the Board conducted 8,899 elections; in 7,982, or nearly 90%, neither side challenged the validity of the results through objections. Of those cases where objections were filed, only 30% involved *Hollywood Ceramics* allegations, and of these only 9 cases went to the courts of appeals. Thus, only 3.4% of the elections were in any way delayed by the *Hollywood Ceramics* doctrine, while a minute .1% of the cases experienced the delay attendant to a court appeal or enforcement. Unfortunately, we have no way of measuring the extent to which the existence of *Hollywood Ceramics* deterred parties from engaging in misrepresentation, but I believe the deterrent effect to be substantial and certainly to be worth some delay in the small number of cases I have just mentioned.

The Effect of Campaigning

Finally, we come to the most controversial, and to me, the most interesting question: Does campaigning by either side affect how the employees vote so that the election result could be affected by campaign misrepresentations? Based on my years of experience at the Board, I answer that question with an emphatic yes. That does not mean that I believe that campaigning is determinative in every election, but I do believe it plays an important role in the vast majority, just as I believe that candidates' campaigning makes a difference in local and national elections.

Indeed, the Board agreed with this view from at least 1948 (when *General Shoe* issued) until 1977 (*Shopping Kart*). But, in *Shopping Kart* the Board decided, based largely on one limited study, that the parties' campaigning did not play a significant part in the employees' decision how to vote and that therefore regulation of misrepresentation was not necessary.

Two things about the *Shopping Kart* decision were extremely troublesome to me. First, the heavy reliance on the study by Getman, Goldberg, and Herman, ***Union Representation Elections: Law & Reality.***[12] Secondly, the implications of the decision for other areas of our administration of the electoral process.

In *General Knit* the majority discusses in detail its disagreement with *Shopping Kart's* emphasis and reliance on the Getman, Goldberg, and Herman study. Briefly, the *General Knit* majority notes that even the authors (who ultimately concluded—on the basis of 81 percent of the voters studied —that campaigning had little effect on voter choice) found, for 5% of the voters, a relationship between their vote and their familiarity with the union campaign. The 5% were from the pool of undecided and "switchers."[13]

The Board majority extrapolates from that, and notes that an argument can be made that the votes of all 19% of the undecided and switchers were affected either by the parties' campaigning or the lack thereof. Moreover, the 19% were critical in 9 of the 31 elections studied. Thus, contrary to the authors, the campaigning, at least by the union, does appear to be important. But, in fact, the authors also recognize that the mere existence of an employer campaign could be significant. This is inferred because all 31 elections were vigorously contested by the employers, and the union won only 8, or about 35%, a percentage far below their nationwide win ratio which at that time was 50%.[14]

Familiarity with Issues

I have other criticisms not contained in the *General Knit* decision. First, the authors' conclusion that campaigning has little effect on the election outcome, was, in their view, buttressed by the voters' lack of familiarity with the vast majority of the issues raised in the campaign. But, as former NLRB Chairman Ed Miller pointed out in his critique of the study,[15] that finding is neither surprising to an experienced observer nor necessarily supportive of the authors' ultimate conclusion. For the experienced campaigner understands that only a few issues are important to the voters, and he will hammer away at them.

Thus, if the leaflets raise 20 issues, but the voters remember only 1, that does not mean that voters' decisions were not influenced by the parties' campaign dialogue on the one issue. Moreover, while campaigning on that issue may make some voters change their minds, its more important function may be to insure that the party does not lose the votes it has. This fuction is extremely important in an industrial election where, on the one hand, the employer has the advantage of having always been present in the plant to explain his position to the employees, while on the other hand, the union has the advantage of being able to file its petition at a time when a union believes its support is at a peak.

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[12] The study was published in book form by the Russell Sage Foundation. Getman and Goldberg originally published their findings in "The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation," 28 *Stanford L. Rev.* 263 (1976).

[13] Employees who were inclined to vote one way at the outset of the campaign and then changed their minds sometime later.

[14] In 2 of the 8 the votes of the undecided and switchers were critical.

[15] Edward B. Miller, A. H. Raskin, Patricia Eames, Robert J. Flanagan, *"Four Perspectives on Union Representation Elections: Law and Reality,"* 28 *Stanford L. Rev.* (1976).

Indeed, the study found that in the elections that the unions lost, the average loss in union support from card signing to vote was 35%; whereas, when it won, the average change was only 4%. The authors cannot explain this statistic, but, in my view, the answer would lie in the relative effectiveness of the parties' campaigns.

I also agree with at least one of the criticisms raised by Patricia Eames, an associate professor of law at Vanderbilt, and former general counsel to the Textile Workers. While she termed the study "extremely important," she criticized it because the authors only studied the voter attitudes as of the weeks immediately preceding the election.[16] By then, a lot of campaigning may have already occurred so that it is difficult to conclude, as the authors did, that 81% had made their decision by the time of the first interview, on the basis of pre-formed attitudes. The campaigning, when it existed, may well have made a difference.

Coercive Conduct

I am not, however, only disturbed by the author's methodology, but also by the direction in which Board decisions would go if the Board were to rely completely on the conclusions the authors drew from their data. Thus, the study did not, as *Shopping Kart* would suggest, have repercussions only in regard to the Board's review of misrepresentation. A major part of its findings dealt with the Board's review of threats and coercion under Section 8(a)(1) and individual discharges under Section 8(a)(3) and whether an election should be set aside on the basis of this kind of conduct. The study concluded that coercive speech under § 8(a)(1) and most coercive conduct under the other sections, had no effect on the voters and that, therefore, the Board should not set aside elections by reason of such conduct.

I am particularly distressed at this recommendation, although I do not believe that the Board as presently constituted—including those who dissent in *General Knit*—would support such a result. Yet it would appear that such a result might flow from the *Shopping Kart* rationale, for if misrepresentations can be evaluated by the electorate, why not threats, interrogations, or even discriminatory discharges?[17] Indeed, one court (the Ninth Circuit) has suggested in a very recent decision that it would, in light of the result of the study, favor a rule whereby an election was no longer set aside because of threats.

"It is tempting to us to seize upon the study and go farther than the Board did in *Shopping Kart*, holding that we will no longer sustain orders setting aside elections, or set aside orders sustaining them, in cases of threats as well as in cases of claimed misrepresentations in election campaigns. However, we resist the temptation because it is the Board, not the courts, that is presumed to be expert in this field."[18]

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[16] *Ibid.*

[17] Of course, the authors of the study argue that employees are as "coerced" by employer conduct which the Board did *not* find to violate § 8(a)(1) and (3) as they are by violative conduct, and, therefore, any regulation is pointless. I do not agree. If the system is imperfect, that does not justify junking it in exchange for an electoral free-for-all in which no employees are protected from coercion.

[18] *Oshman's Sporting Goods, Inc. v. NLRB*, slip op., p. 5 (CA-9, Nov. 20, 1978.)

I believe this decision to be a bellwether of the direction that the law might have taken had *Shopping Kart* remained in effect. And, had the Board continued to relax its standard, it seems inevitable to me that certain employers and unions would have taken advantage of the relaxed standards to engage in campaigns based on gross distortions, innuendo, and veiled and not-so-veiled threats—more aimed at coercing voters than persuading them thoughtfully. In my view, however, *General Knit* will prevent any deterioration in the level of campaigning, and once again assure the continued integrity of the Board's electoral processes. **[The End]**

CONTRACT ENFORCEABLE PAST EXPIRATION

Enforcement by a union of a bargaining agreement and its union-security provision was lawful even after the expiration date of the contract, the NLRB ruled. In making this decision, a three-member Board panel concluded that the union was merely maintaining the status quo pending the resolution of a representation question (*Trico Products Corp.*, 1978-79 CCH NLRB ¶ 15,095).

Three theories were raised by the General Counsel as to why the union's attempts to enforce its union-security clause should be unlawful. First, argued the General Counsel, the union had been defeated in a representation election. However, the Board injected its well-established rule that election results are not effective until after certification.

The two other arguments raised by the General Counsel concerned the expiration date of the contract. The General Counsel argued that the contract had terminated after its expiration date and that it was being maintained while a representation question was pending. However, the Board found that the union had delivered no notice of termination and that the contract continued in force by its own language. Moreover, the union and the employer had made no attempt to change employees' wages and working conditions.

STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC.

Name: Truesdale (LAST) John (FIRST) C. (MIDDLE)

Position to which nominated: Member, National Labor Relations Board **Date of nomination:** 8/5/80

Date of birth: 17 (DAY) 7 (MONTH) 21 (YEAR) **Place of birth:** Grand Rapids, Michigan

Marital status: Married **Full name of spouse:** Karin Nelson Truesdale

Name and ages of children:

John C. III	22	Andrew C.	16
Charles N.	20		
Margaret E.	18		

Education:

Institution	Dates attended	Degrees received	Dates of degrees
Grinnell College	1938-1942	A.B.	1942
Cornell University	1946-1948	M.S.I.L.R.	1948
Georgetown University	1968-1972	J.D.	1972

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

Memberships: List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable and other organizations for the last five years and any other prior memberships or offices you consider relevant.

Organization	Office held (if any)	Dates
American Bar Association		1968-Present
Section of Employment & Labor Law		
District of Columbia Bar		1972-Present
Maryland Bar Association		1972-Present
Federal Bar Association		1977-Present
Society of Professionals in Dispute Resolution		1973-Present

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

6/42-7/42	Inspector's Asst.	Firestone Tire & Rubber Co.	Cleveland, Ohio
7/42-8/42	Boat Attendant	George Williams College Camp	Lake Geneva, WI
8/42-12/42	Jr. Prof. Asst.	War Prod. Board	Wash., DC
Winter '49 -'50	Extension Lecturer	Cornell University	Ithaca, NY
10/46-6/47	Research Asst.	Cornell University	Ithaca, NY
3/48-12/50	Field Examiner	NLRB	Buffalo, NY
1/51-7/52	Field Examiner	NLRB	New Orleans, LA
7/52-8/57	Admin. Analyst	NLRB	Wash., DC
9/57-9/59	Deputy Dir. of Info.	National Academy of Sciences	Wash., DC
9/59-Fall '60	Dir. of Info.	National Academy of Sciences	Wash., DC
Fall '60 - 9/63	Sec'y Panel on Biol. & Med. Sciences & Dir., World Data Center	National Academy of Sciences	Wash., DC
9/63-8/67	Associate Executive Secy.	NLRB	Wash., DC
8/67-6/72	Deputy Executive Secretary	NLRB	Wash., DC
6/72-10/77	Executive Secretary	NLRB	Wash., DC
10/77-present	Board Member	NLRB	Wash., DC

Government experience: List any advisory, consultative, honorary or other part-time service or positions with Federal, State, or local governments other than those listed above.

Published writings: List the titles, publishers and dates of books, articles, reports or other published materials you have written.

Political affiliations and activities: List all memberships and offices held in or financial contributions and services rendered to all political parties or election committees during the last five years.

sustaining member of Democratic Party ($120.00 a year) and small contributions to various Democratic candidates

Future employment relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

   N/A (presently Member of National Labor Relations Board)

2. State whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

   No

3. Has a commitment been made to you for employment after you leave Federal service?

   No

4. Do you intend to serve the full term for which you have been appointed or until the next Presidential election, whichever is applicable?

   Yes

Potential conflicts of interest:

1. Describe any financial arrangements, deferred compensation agreements or other continuing financial, business or professional dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

   None

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

   None

3. Describe any business relationship, dealing or financial transaction which you have had during the last five years whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None

4. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any Federal legislation or of affecting the administration and execution of Federal law or policy.

None

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

There are none.

The **Chairman**. Thank you.

My time has come to recognize Senator Humphrey for any opening statement that he may have.

Senator **Humphrey**. I will just, if you do not mind, defer my opening statement until it is my turn for questioning. It is very brief.

The **Chairman**. Senator Hatch?

Senator **Hatch**. Mr. Truesdale, I think in my statement I did make a misstatement and I think you did catch it.

I meant to say——

Mr. **Truesdale**. Senator Hatch, I am sorry, I cannot hear.

Senator **Hatch**. I think you caught a misstatement in my statement that I had overlooked. I think I said "Prominent among these members are Mr. Truesdale himself, during whose tenure has yet to decide * * *" I should have said "* * * during whose tenure has yet to decide in the opinion of some, in favor of any position considered contrary to that officially representing union interests."

Senator **Hatch**. Some would say in the last 6 months, as I say, you have been running for this position, that you have considered some of the interests of management. Others would say that there may be other areas where you have.

Mr. **Truesdale**. Could I comment on that?

Senator **Hatch**. Sure.

Mr. **Truesdale**. I saw a statement in BNA by someone that I was "posturing for renomination." I think a sampling of my decisions would show that that simply is not so. How can one defend against that? But, in any event, a sampling of my opinions would show that is not true.

In an early decision in my tenure, I cast a vote against *Serv-u Stores* that found a card invalid; had I ruled the other way, that card would have supported the entry of a bargaining order. In *GAF Corp.,* I ruled that a document circulated by a union had been doctored to the point where it made invalid the election which the union had won. I set that election aside.

In *United Dairy,* for example, where I voted not to enter a bargaining order in the absence of the union having established a majority, a decision, by the way, which made the union violently unhappy; that case alone would indicate that the sentence in your statement is inaccurate.

Senator **Hatch**. Of course, in *United Dairy,* one of the few times in history you voted for equal access.

Mr. **Truesdale**. I have voted for equal access in *J. P. Stevens* and *United Dairy.*

Senator **Hatch**. Is that not a relatively new concept?

Mr. **Truesdale**. No, it is not, Senator. I believe that that particular policy was bottomed in a Board decision of the midsixties, *H. W. Elson Bottling Co.,* in which the Board faced there—I use the words of the Supreme Court now—"outrageous and pervasive unfair labor practices," and the Board felt it did not have the authority to enter an order in the absence of a majority but felt that the scope of the unfair labor practices were such that the Board simply had to do something to try to reestablish the status quo in that situation.

A later case, *Loray*—L-o-r-a-y, and I suppose the *J. P. Stevens* cases are the principal ones. The second circuit itself in enforcing one of the *J. P. Stevens* cases provided for that remedy. And we provided that remedy in *Florida Steel* which, as you know, on that particular aspect, was enforced by the fifth circuit as to the plant in question, but was denied enforcement by the fifth circuit in respect to other *Florida Steel* plants. The Board in the cases I have participated in uses that remedy only in the most extreme cases and only where——

Senator Hatch. Is it correct that is where it was first used?

Mr. Truesdale. No, *H. W. Elson Bottling Co.*

Senator Hatch. Which was the first cases where equal access was used by the Board?

Mr. Truesdale. *H. W. Elson Bottling Co.* I think that was in the midsixties. It was used in *J. P. Stevens.*

But, in any case in which the Board has ever used it, it is only in these situations where it is considerably marked by "outrageous" and "pervasive" unfair labor practices. The Board has never used that remedy nor given the slightest sign of doing so in any case marked by routine labor practices.

Senator Hatch. I think you did make a quote from me. In fact, I have heard you state publicly your view that "the NLRB is the best agency in Government." Your emphasis. You described the NLRB as "one of the truly model agencies of Government today." That is true, I have said that.

And I think the quotes are accurate, however they refer to the administration of the NLRB, and I do not think anybody was misled by that, and not to the NLRB decisionmaking ability and whatever they have done in the last 3 or 4 years. I intend to work to achieve the proper balance on the latter so that, in the future, I will not have to qualify my statements regarding the excellence of NLRB.

One of the things I am concerned about is not whether people are nice who are appointed to the Board, and I think you are, or people who have nice resumes. You have this also.

The question is are we going to have a balance on the Board which was intended by the act and, of course, intended, I think, by all who wanted to practice before the Board?

I am concerned that there is going to be a tremendous imbalance.

Let me begin this way. The jurisdictional standards of the NLRB were first announced in 1958 in the *Siemon's Mailing Service* case. These standards were expressed in dollar value depending on the type of business in question. Inflation has eroded these jurisdictional thresholds. Thus, effectively expanded jurisdiction over businesses with only a minimal effect on interstate commerce. The critics of the Board have noted that the resultant expansion in the NLRB caseload has increased the amount of time available for careful treatment of cases coming before the Board. Their lack of time, in effect, may be one reason why the Board is so often reversed by the court of appeals.

To solve this problem, one would think that the NLRB would modernize its jurisdictional standards. The Board has taken the opposite approach. It has gone to great lengths to. A day care center run by the Salvation Army, a CETA project, a social service administering programs to the elderly, Catholic schools, a home for mentally retarded children, a counseling service for drug addiction, a United Way agency operating a preschool for children with learning disabilities, a social service agency providing alcohol abuse counseling and family planning, and a Headstart program.

My principal concern is that you have participated in and have endorsed each one of these assertions of jurisdiction.

It has always been my understanding that the National Labor Relations Act was the product of the bitter strikes which were sweeping the country. Now we find the Labor Act being used with organized companies who serve small children, the disabled, the handicapped and. of course, overriding your jurisdictional decisions.

In your opinion, what specific impact do these employers have on interstate commerce that justifies an assertion of broad jurisdiction?

Mr. **Truesdale**. Senator, in each case, there is a statement of the jurisdictional facts. I cannot state at this moment the particular facts in any one of those cases.

We don't inject ourselves into any situation. Our processes can only be invoked by someone coming to us, to file an election petition or an unfair labor practice charge. I share the sympathy or concern that you have for the types of people today who are being helped by this type of organization. But we have to remember that these people who are working people, they are people who feel that if a majority of them vote for a union that they will be helped in their working situation by being represented by a union.

I do not believe that we can say to them, well, you cannot be given the protection of the National Labor Relations Act, or subjected to its responsibilities, because we have to restrict our operations. If those employees are in an organization affecting interstate commerce, it seems to me that we cannot turn them down on those grounds.

Now, to my knowledge—you may know differently—but to my knowledge, no employer group, no union group has urged that the Board revise its jurisdictional standards up or down as the inflation ebbs or flows. And I think I should point out that that sword cuts both ways.

The small employer who may have been swept under the act, also is protected by the act from illegal secondary activities by unions, and that sort of thing.

So I am not sure they would want us to change those standards.

Senator **Hatch**. I bet everyone of those small employers, to a person, would say we wish to heck they would keep out of our lives.

You have expanded the act, Mr. Truesdale, to an unneccessarily unprecedented degree—that is one of the problems I have—to the point where a lot of little, marginal companies having to comply with all of the onerous burdens of the act, frankly, this is a minor point, but an important point, at least to the small companies who really were not intended by the Congress to be covered under the act.

Mr. **Truesdale**. Section 14(c) of the statute says that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." I would not want to parse that proviso here off the top of my head, but I am sure that that proviso would need serious consideration in any decision to raise the floor of our jurisdictional standards.

The Congress, in amending the act in 1959, I think, removed our ability to do that, if I read this correctly.

The **Chairman**. What did we have in the aborted labor law reform bill, anything?

Mr. **Truesdale**. I do not know.

The **Chairman**. Are you not an authority on that?

Mr. **Truesdale**. What?

The **Chairman**. Are you not an authority on that?

Mr. **Truesdale**. I am not.

The **Chairman**. I wonder if Bob Thompson has anything to say on that?

Did he change jurisdiction?

Mr. **Thompson**. No, sir.

The **Chairman**. That is a hard and fast law, then.

Senator **Hatch**. Mr. Chairman, I have a tremendous problem this morning, because I have two very important committee meetings going on. The other one is about to start in 5 minutes, and I do have to go up and start it. But I do have many more questions for Mr. Truesdale.

I know that you may want to pass on this round, but you will have questions, also. Senator Humphrey has some questions.

I will try to go up. I know I cannot stay for the entire hearing. But it does have to do with the Robert Vesco grand jury problems. And being one of two who has been investigating that, I feel that I have just got to go take that time. But I will try to be back here as soon as I can.

I am sure Senator Humphrey will continue until I get back.

The **Chairman**. Are you going to be generous and leave me your proxy?

Senator **Hatch**. Ordinarily, I would be glad to do that.

The **Chairman**. I think I will ask Mr. Thompson to come on, if Mr. Truesdale can stand by for a return to the table for further questioning.

Mr. **Truesdale**. I am available for now until the committee is done with me.

The **Chairman**. Until when?

Mr. **Truesdale**. Until the committee is done with me.

Senator **Hatch**. I will try to be back as soon as I can. I apologize.

Mr. Thompson, I apologize.

The **Chairman**. We will welcome Robert Thompson, chairman of the Labor Relations Committee, Chamber of Commerce, and a very faithful observer. We always feel better when you are in the gallery when we are on the floor.

STATEMENTS OF ROBERT T. THOMPSON, CHAIRMAN, LABOR RELATIONS COMMITTEE, CHAMBER OF COMMERCE, ACCOMPANIED BY G. JOHN TYSSE, DIRECTOR, LABOR LAW, U.S. CHAMBER OF COMMERCE; ARTHUR F. ROSENFELD; AND RICK LAWSON; FRANCIS T. COLEMAN, LABOR RELATIONS COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C.

Mr. THOMPSON. Senator, it is always a pleasure to appear before you and your committee. It did not go unnoticed by me that you excluded me from the legal scholars here today. I do not take offense at that.

The CHAIRMAN. I have a postscript. I did not put everything in. You notice, I said at the appropriate time I would refer to your scholarship, Bob.

Mr. THOMPSON. I have long admired your gallant efforts in connection with the work of this committee, and particularly appreciate the many courtesies that you have extended to me and the organization which I represent.

I noticed on your agenda that you included the National Association of Manufacturers on a panel with us. I do not want to allow that to go by, and then somehow they miss their opportunity.

The CHAIRMAN. We did have that as a panel. Why not all of you here together?

Mr. THOMPSON. I think we would probably both prefer going separately. We will all sit here, but treated separately, if that is agreeable.

I have with me today, Mr. Chairman, Senator Humphrey, John Tysse, who is the labor relations director of the Chamber of Commerce, and a member of his staff, Mr. Arthur Rosenfeld, on my far left, and a member of my staff, Mr. Rick Lawson, as well.

I will attempt to summarize my statement.

My name is Robert T. Thompson. I am senior partner in the law firm of Thompson, Mann & Hutson of Washington, D.C. I am also regional vice chairman of the Board of Directors of the Chamber of Commerce of the United States and serve as the chairman of its Labor Relations Committee. Accompanying me is G. John Tysse, director of labor law for the U.S. Chamber.

The U.S. Chamber is the world's largest business federation, comprising more than 101,000 members, including 97,000 business firms, 2,700 State and local chambers of commerce, and 1,300 trade and professional associations. The chamber is vitally interested in, and welcomes this opportunity to testify regarding the confirmation of John C. Truesdale as a member to the National Labor Relations Board (NLRB).

The chamber opposes the confirmation of Mr. Truesdale to the 5-year term as NLRB member. Mr. Truesdale's current tenure as member, a position he has held since October 1977, when appointed by President Carter to serve out the term of member Peter D. Walther, who resigned, expires on August 27, 1980.

I should add at this point, I know Mr. Truesdale personally. He has commented in the press that he feels that I better than most know that he is a fairminded gentleman. I consider him a fine person, and I certainly do not intend for the remarks that I will make here today to reflect upon his character, or his own characterization of himself as being impartial, except to the extent we so state in this presentation.

I think Mr. Fanning and Mr. Jenkins and the other members of the Board, and the members of this committee, and Mr. Kirkland, the president of the AFL-CIO, are fine gentlemen. And I concur with the remarks of the chairman at the outset that we can and should be able to disagree.

We do have a serious concern which we have evidenced this year particularly, and our open opposition to members of this Board, namely, Messrs. Lubbers and Zimmerman, which is the real thrust of our position here today.

I do not say that with the idea that I am afraid to be critical of anyone or anything. I think I personally, as well as the chamber, have an established record of being somewhat fearless in that regard. But I want to be sure our remarks are properly characterized by me as we go into this thing.

Mr. Truesdale's recorded positions on decisions rendered by the NLRB since his appointment as member have caused grave concern among chamber members who believe that, in order to advance its foremost goal of minimizing industrial strife, the NLRB, which functions both as judge and jury, must act in an impartial manner. Interested parties are disturbed by a recent trend indicating that the NLRB had strayed from middle ground and has adopted an activist antibusiness posture. We believe the confirmation of Mr. Truesdale would accentuate this trend. In his nearly 3 years as member, Mr. Truesdale has frequently joined with Chairman Fanning and Member Jenkins to comprise the majority in important decisions that convince the chamber that the NLRB is not an impartial arbiter.

It is of utmost importance to labor management stability in this country that balance and diverse viewpoints be restored to the NLRB. The confirmation of John C. Truesdale will not satisfy this requirement.

The Chair stated earlier it was not aware of criticisms against the Board from business quarters. With all due respect to that observation, I would call attention to the fact that the U.S. Chamber of Commerce has, within recent months, and within the last year, openly and straight forwardly criticized the trend of decisions in the National Labor Relations Board.

Our litigation center, of which until recently I was chairman, has seen fit to intervene in amicus briefs in numerous cases of the NLRB which have been appealed to the court of appeals, and which we have made a contribution to the statistics cited by Senator Hatch, which show an increasing number of reversals of NLRB decisions within the last year or two.

In addition to our criticism, which I think has been very outspoken, and I would be glad to furnish the chairman with copies of these criticisms, because we are very concerned over the trend of this Board, former Chairman Miller, who is twice removed from the Chairman of the NLRB, made a speech at the recent meeting of the American Bar Association, where he openly criticized decisions. Former General Counsel Irving made a similar speech in which he highly criticized the current trend of decisions of the National Labor Relations Board.

I would request permission to submit copies of these speeches, as well as the publications of the chamber to which I have referred, as a part of this record, so the readers of this record might have the benefit of those criticisms, which are very specific, and indicate very concerned people.

The CHAIRMAN. We will receive those as part of our record.

Mr. THOMPSON. In addition, I will not ask this be included in your record, but I would call the Committee's attention to the extent of debate over the confirmations of Messrs. Lubbers and Zimmerman, where there was ample criticism of the current trend of decisions of the National Labor Relations Board.

The CHAIRMAN. They are already in the record.

Mr. THOMPSON. Yes, sir.

As I say, I do not intend to ask that they be included in here. But I would call attention to them as further examples of criticisms among the very members of this Senate, of decisions of the National Labor Relations Board.

Mr. Truesdale's record since joining the NLRB cannot be properly assessed without examining the role which the Board serves in setting national labor management policies.

The NLRB was established in 1935 by passage of the National Labor Relations Act, which we commonly refer to as the Wagner Act. The act attempted to balance individual rights and economic freedoms against controls that Congress felt would reduce the existing rampant labor conflicts that hindred economic growth in the United States. In an attempt to fine tune this delicate balance, the Taft-Hartley Act was passed in 1947. Among other provisions, Taft-Hartley increased the size of the Board from three to five members.

The NLRB was intended by Congress to be "* * * one of those agencies presumably equipped or informed by experiences to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." Thus, the NLRB represents something different than a body whose function is to interpret the law. Rather, the Board operates as a buffer between labor and management, utilizing its expertise in the field of labor-management relations to facilitate accord between the parties. A firm grasp of the law is imperative, but the power to state the law, and to interpret that law, is reserved to Congress and the courts respectively by the Constitution. The job of the NLRB is to delineate the practical requisites of the law, thus enabling the parties—management and labor—to negotiate and satisfy their own needs while respecting and furthering the needs of our society as a whole. In acting as an impartial intermediary, the NLRB acts as a relief valve for disputes between the parties, thus preventing industrial violence and other self-help results which may occur when adversaries have no effective forum in which to air their grievances.

Unfortunately, if an employer perceives the NLRB to be biased, its role as a buffer between labor and management is compromised. If an employer believes that the NFLB will go to extremes to hold against his position, neither time nor money will be spent in seeking a hearing before the Board. Alternatively, the prospect of receiving legal redress through the NLRB may seem so remote that an employer will agree to an unfavorable settlement, or perhaps grant recognition to a union rather than exercise his legal right to resist.

The National Labor Relations Act was passed to protect employees, not employers or unions. An employee's statutory right to refrain from organizing is jeopardized when an employer, despairing that the NLRB is another weapon in the arsenal of a union, throws up his hands in defeat. The right to raise an appeal in the Federal courts is of small consolation. The cost of such an action is beyond the resources of many, and I might say, most employers.

In fact, in NLRB fiscal year 1979, over 60 percent of certification elections—to determine whether employees wished to be represented by a union—took place in units that had less than 40 eligible employee voters. This clearly indicates that smaller employers, unable to bear the excessive costs of appeals, most often face organizational battles.

There is another point which should be made here. That is, when you look at the statistics of the Board's caseload, and if you look particularly at the statistics which were advanced here today by Mr. Truesdale on the number of cases which were settled, the percentage of cases which were settled, and if you add to that the cases closed by way of dismissal or withdrawal, I think you would find that that takes the percentage over 90 percent, if I recall the latest statistics correctly. And if you look at what the present trend of the Board is likely to do, those statistics, you will see, I think, a qreater threat to the workings of this agency and the burdens that the Labor Board must carry than by simply looking at the manner they operate at the present time.

By that, I mean this. If employers are going to perceive they are going to be mistreated, then they are less likely to cooperate with this agency. They are less likely to come to the settlement terms which are so highly touted here today in percentages. These percentages are likely to go down and result in more litigation. And the workload of this agency is likely to increase measurably.

I would suggest that if the employer community, simply by the workings of reason and rationality, determine that this agency is going toward a partial status, and there are already many signs of this, then the workings of this agency are in for some troubled times simply from the numbers of cases and the fact there is no way they can have the manpower or the resources to cope with that workload. The same, I think, is true if you look at the record of the results that are being achieved in the appeals from Labor Board decisions. The drop in the success ratio of Labor Board in the courts of appeals, 74 plus percent to 64 percect in a year's time, is a dramatic change. One which should tell the Labor Board and should tell this committee about the present trend of this Board.

We do not come here to express a partial or biased view against a man named Truesdale. We come here to express a grave concern over a trend of decisions which he has participated in, a trend going away from balanced interpretation of law and into an unbalanced prounion interpretation of the law which is only going to lead away from the stated goals and objectives of this statute which they are set to administer.

I see my time is up. I submit the remainder of my statement with the permission of the committee for the record.

We have gone through numbers of cases we feel are important and we have attached an additional list. And I hope the committee and its staff will take the time to look at those cases and view our concerns in light of what I have said.

The CHAIRMAN. We will, in questioning, get to some of the cases that you developed in your prepared remarks, which will be included completely in the record, of course.

Mr. THOMPSON. Thank you, sir.

[The prepared statement of the chamber of commerce, as presented by Mr. Thompson, follows:]

STATEMENT
on
THE CONFIRMATION OF JOHN C. TRUESDALE AS MEMBER
of the
NATIONAL LABOR RELATIONS BOARD
before the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
August 22, 1980

My name is Robert T. Thompson. I am senior partner in the law firm of Thompson, Mann and Hutson of Washington, D.C. I am also Regional Vice Chairman of the Board of Directors of the Chamber of Commerce of the United States and serve as the Chairman of its Labor Relations Committee. Accompanying me is G. John Tysse, Director of Labor Law for the U.S. Chamber.

The U.S. Chamber is the world's largest business federation, comprising more than 101,000 members, including 97,000 business firms, 2,700 state and local chambers of commerce, and 1,300 trade and professional associations. The Chamber is vitally interested in, and welcomes this opportunity to testify regarding, the confirmation of John C. Truesdale as a Member to the National Labor Relations Board (NLRB).

The Chamber opposes the confirmation of Mr. Truesdale to the five-year term as NLRB Member. Mr. Truesdale's current tenure as Member, a position he has held since October, 1977, when appointed by President Carter to serve out the term of Member Peter D. Walther, who resigned, expires on August 27, 1980.

Mr. Truesdale's recorded positions on decisions rendered by the NLRB since his appointment as Member have caused grave concern among Chamber members who believe that, in order to advance its foremost goal of minimizing industrial strife, the NLRB, which functions both as judge and jury, must act in an impartial manner. Interested parties are disturbed by a recent trend indicating that the NLRB has strayed from middle ground and has adopted an activist anti-business posture. We believe the confirmation of Mr. Truesdale would accentuate this trend. In his nearly three years as Member, Mr. Truesdale has frequently joined with Chairman Fanning and Member Jenkins to comprise the majority in important decisions that convince the Chamber that the NLRB is not an impartial arbiter.

It is of utmost importance to labor-management stability in this country that balance and diverse viewpoints be restored to the NLRB. The confirmation of John C. Truesdale will not satisfy this requirement.

Role of the NLRB

Mr. Truesdale's record since joining the NLRB cannot be properly assessed without examining the role which the Board serves in setting national labor-management policies.

The NLRB was established in 1935 by passage of the National Labor Relations Act (Wagner Act). The Act attempted to balance individual rights and economic freedoms against controls that Congress felt would reduce the existing rampant labor conflicts that hindered economic growth in the United States. In an attempt to fine tune this delicate balance, the Taft-Hartley Act was passed in 1947. Among other provisions, Taft-Hartley increased the size of the Board from three to five members.

The NLRB was intended by Congress to be "... one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." [1] Thus, the NLRB represents something different than a body whose function is to interpret the law. Rather, the Board operates as a buffer between labor and management, utilizing its expertise in the field of labor-management relations to facilitate accord between the parties. A firm grasp of the law is imperative, but the power to state the law, and to interpret that law, is reserved to Congress and the courts respectively by the Constitution. The job of the NLRB is to delineate the practical requisites of the law, thus enabling the parties (management and labor) to negotiate and satisfy their own needs while respecting and furthering the needs of our society as a whole. In acting as an impartial intermediary, the NLRB acts as a relief valve for disputes between the parties, thus preventing industrial violence and other self-help results which may occur when adversaries have no effective forum in which to air their grievances.

Unfortunately, if an employer perceives the NLRB to be biased, its role as a buffer between labor and management is compromised. If an employer believes that the NLRB will go to extremes to hold against his position, neither time nor money will be spent in seeking a hearing before the Board. Alternatively, the prospect of receiving legal redress through the NLRB may seem so remote that an employer will agree to an unfavorable settlement, or perhaps grant recognition to a union rather than exercise his legal right to resist. The National Labor Relations Act (NLRA) was passed to protect employees, not employers or unions. An employee's statutory right to refrain from organizing is jeopardized when an employer, despairing that the NLRB is another weapon in the arsenal of a union, throws up his hands in defeat. The right to raise an appeal in the federal courts is of small consolation. The cost of such an action is beyond the resources of many employers. In fact, in NLRB fiscal year 1979, over 60% of certification elections (to determine whether employees wished to be represented by a union) took place in units that had less than 40 eligible employee voters. This clearly indicates that smaller employers, unable to bear the excessive costs of appeals, most often face organizational battles.

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[1] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

REVIEW OF DECISIONS

A review of some decisions in which Member Truesdale has participated will demonstrate that the perception of the NLRB as pro-union and anti-business is justified.

It must be emphasized, in fairness to Member Truesdale, as well as to stress the values inherent in an ideal diversity among the NLRB members, that Member Truesdale has not always aligned himself with Chairman Fanning and Member Jenkins in anti-business decisions. However, the cases illustrate that Messrs. Fanning, Jenkins, and Truesdale have too often formed the majority in NLRB decisions that indicate the activist pro-union stance of the Board.

It is particularly important that Board decisions on critical issues reflect vital divergent views. A well articulated dissent can convey valuable opposing viewpoints to an appellate court, especially in the case of an agency like the NLRB where considerable deference is accorded, due to its presumed expertise. Given the current makeup of the Board, if Mr. Truesdale is reconfirmed by the Senate, the quantity, and perhaps quality, of dissenting voices will suffer. Mr. Truesdale's all too infrequent divergencies from the opinion of Messrs. Fanning and Jenkins, (e.g. Gould Corp.[2/]), simply do not satisfy the need for consistently strong opposing viewpoints among members of an agency which is perceived as one-sided and activist by those subject to its jurisdiction. Confirmation of Mr. Truesdale would do nothing to restore the requisite balance to the NLRB.

[2/] 237 NLRB No. 124 (1978).

The direction of the NLRB was perceptibly altered with the addition of Member Truesdale in 1977, giving a majority voice to the heretofore dissenting Messrs. Fanning and Jenkins. Not only has this new majority affected the rights of the parties, but the continued effectiveness of the NLRB is at stake. This is evidenced by the increased hostility shown by federal courts when asked to enforce NLRB orders. Board orders carry no sanctions and therefore the NLRB endeavors to obtain voluntary compliance. Even though enforcement is sought in many routine cases, the affirmance rate, measuring the success of the NLRB before the federal courts, has dropped significantly in the recent past.[3] The declining affirmance rate encourages parties to challenge Board decisions more frequently, increasing its workload.

A. Conflicts With Federal Appellate Courts

The NLRB has come under growing fire from the federal courts of appeal. Increasing reversals indicate a desperate need for changing the existing makeup of the NLRB. In aligning himself in so many decisions with Chairman Fanning and Member Jenkins, Mr. Truesdale had demonstrated that his presence has not balanced the NLRB. Accordingly, the trend in the appellate courts is almost certain to continue. And these court reversals are simply pyrrhic victories if in many cases employers cannot afford to take advantage of the appeals process.

Air Transit, Inc.,[4] is a prime example of the potential continuing conflict between the NLRB and the courts. The issue involves the often-debated question of whether an individual is an employee or an independent contractor, for purposes of the NLRA. In this case, the Board majority of Truesdale, Fanning and Jenkins had reversed an NLRB regional director and held that cab drivers were employees and, as such, subject to the protections of the NLRA.

3/ Declined from 84% in fiscal 1978 to 77% in fiscal 1979.

4/ 248 NLRB No. 140 (1980).

Member Penello, in a strong dissent, asked why the majority chose to ignore the strong federal court decision to the contrary in Yellow Cab Company 603 F.2d 862 (D.C. Cir. 1978). If anything, Member Penello pointed out, the facts in Air Transit were less compelling in favor of employee status than in Yellow Cab.

It is difficult not to classify this case as anything less than sheer obstinance on the part of the Board majority. Air Transit and Yellow Cab also illustrate the apparent intent of the NLRB to continue to expand its jurisdiction. The D.C. Circuit was critical of the NLRB in Yellow Cab, pointing out that a question of law (the common law agency test used to determine whether an employee or independent contractor) is not affected by the NLRB's presumed labor expertise. The Court accused the Board of vacillating: "This process of ad hoc and inconsistent judgments - in which the only determinative element seems to be the composition of the NLRB panel which happens to hear the case - has descended in the instant case almost to the point of absurdity."

Unfortunately, this sort of criticism, and the resultant loss of credibility by the Board, has apparently not deterred Messrs. Fanning, Jenkins and Truesdale.

Another area of conflict between the Board and courts involves employee protests over a change of supervisory personnel by management. In Abilities and Goodwill, Inc.,[5/] an NLRB majority of Truesdale, Fanning and Jenkins held that employees may strike to protest the firing of the second highest ranking management official of the Company.

The U.S. Court of Appeals for the First Circuit disagreed,[6/] again demonstrating the value of a strong dissent (Penello and Murphy). The First Circuit rejected the Board majority's test, which would have allowed almost any form of protest so long as it is first determined that the employees have the right to engage in concerted activity, noting that the majority of courts confronted with the Board's all-or-nothing test have rejected it.

Abilities and Goodwill, Inc. presents an interesting contradiction regarding Mr. Truesdale's opinions. Whereas the Chamber commends Mr. Truesdale on his interpretation of the supervisory exclusion in the National Labor Relations Act, we also note that, by his decisions in cases such as Abilities and Goodwill, Inc., Mr. Truesdale has effectively blunted the very exclusion that he ostensibly espouses.

5/ 241 NLRB No. 5 (1979).

6/ Abilities and Goodwill, Inc., v. NLRB, 612 F.2d 6 (1979).

B. Secondary Activity - Sympathy Strikes

Chevron, U.S.A.,[7] decided by a split panel with Mr. Truesdale in the majority, looks at the language of, and bargaining history behind, a no-strike provision in a bargaining agreement. The issue presented was whether the provision prohibited secondary sympathy strikes. A subcontractor's employees had set up a picket line at a refinery which was honored by a few Chevron employees — who were disciplined. Despite (1) strong no-strike language; (2) evidence that the union had once before engaged in a sympathy strike and returned to work after the employer threatened to sue for breach of contract; and (3) testimony that the Union had, at the last negotiations, sought and failed to obtain a provision permitting sympathy strikes, Members Truesdale and Fanning, over a dissent by Member Penello, found that the no-strike clause was not intended to apply to sympathy strikes.

Interestingly, eight days after this decision was handed down, the 7th Circuit Court of Appeals issued a ruling in a similar case.[8] The Court severely chastised the Board for disregarding the plain language of the no-strike provision, holding it applied to secondary sympathy strikes. Chevron, U.S.A. may exact the same result.

C. NLRB Attempts to Legislate

As previously stated, the NLRB does not have the authority to make or amend the law. This is a power reserved to Congress. The Chamber is highly concerned with increasing NLRB decisions which are apparent attempts to make new law.

In United Dairy Farmers' Coop. Assn.,[9] the Board considered the issue of whether an employer could be forced to bargain with a union which had never demonstrated support by a majority of employees in the bargaining unit. Simply put, if the Board were allowed to issue a bargaining order in this situation, the desire of the majority of employees, guaranteed by Section 7 of the NLRA, would be swept aside. Employees would find themselves represented by a union, even though less than half of them had expressed a desire to be organized.

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[7] 244 NLRB No. 160 (1979).

[8] W-I Canteen Service, Inc., v. NLRB, 606 F.2d 73[illegible] (1979).

[9] 242 NLRB No. 179 (1979).

The current status of the *United Dairy Farmers* issue is unclear. The case is presently on appeal.[10] What is clear is that Chairman Fanning and Member Jenkins have unecuivocally stated that the NLRB has the right to ignore the wishes of the majority. Member Truesdale ambiguously stated in his opinion that the NLRB *may* have thisauthority. Only Member Penello, in dissent, recognized "... the fundamental principle that the Act, like our democratic society, is grounded on the premise of majority rule."

Fanning, Jenkins, and Truesdale predicated the possibility of this extraordinary remedy on their expansive reading of *NLRB v. Gissel Packing Co., Inc*., 395 U.S. 575, a case decided by the United States Supreme Court in 1969. As Member Penello illustrated, the consolidated cases before the Supreme Court in *Gissel* all involved situations where the union had obtained authorization cards from a majority of employees. Conversely, in *United Dairy Farmers*, not only was there an absense of a card majority, but the union also lost the election by two votes.

The damages inherent in the ready availability of a bargaining order remedy, even when a card majority exists, were demonstrated in *Appletree Chevrolet, Inc., v. NLRB*.[11] Here an NLRB panel (Truesdale, Jenkins, Murphy) issued a bargaining order. The U.S. Court of Appeals for the Fourth Circuit refused to enforce the order, pointing out "... that an election, not a bargaining order, remains the traditional, as well as the preferred, method for determining the bargaining agent for employees." [12] Indeed the NLRB, in its eagerness to issue a bargaining order, premised the order on the existence of discriminatory discharges. Fortunately, the 4th Circuit held that the only evidence sustaining the assumption that the discharg of four admittedly unproductive employees was discriminatory was "nothing but conjecture." The NLRB had used a bootstrap argument to support a bargaining order.

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[10] A companion case, decided the same day, *Haddon House Food Products, Inc. and Flavor Delight, Inc*., 242 NLRB No. 180 (1979), is also up on appeal.

[11] 237 NLRB 103 (1978).

[12] 608 F.2d 988, 103 LRRM 2066 (1979).

Disregard of the wishes of the majority of employees, as well as a disrespect for the election process, was illustrated by the Board from a different perspective in the Gaylord Broadcasting Case.[13] Members Fanning and Truesdale, over a dissent by Member Penello, found that a petition filed by employees seeking to decertify the union was barred by the existence of a bargaining agreement. The "contract bar" rule is established law. However, in Gaylord, the contract had not been signed. Members Fanning and Truesdale accepted, for purposes of invoking the rule, a document wherein certain provisions had been initialled by the parties during the negotiating process. The decertification petition was filed prior to the scheduled execution date of the agreement, which never took place.

Experienced negotiators realize that initialling provisions during an ongoing negotiations is an indication of tentative agreement only. The contract still must be ratified by the union membership, as well as accepted by management. In fact, in Gaylord, there were additious to and subtractions from the document after the bargaining process had apparently ended. As Member Penello stated, the majority had managed to avoid a process (election) preferred by the National Labor Relations Act, while at the same adding great uncertainty to the "contract bar" doctrine.

Additional reasons for the Chamber's concerns regarding the NLRB's legislative attempts are shown in another Truesdale opinion. In First National Maintenance Corp.,[14] the NLRB decided that employers must bargain with the union over the decision to shut down an operation. This goes well beyond the current law which requires bargaining over the effects of a closing, but heretofore not over the managerial decision to close. Furthermore, the remedies chosen by the Board are similar to proposals presently before Congress that would create plant closing/relocation controls. For example, in First National the employer was ordered to pay employees from the date of the closing, which amounts to severance pay. The employer was ordered to grant a first right of employment at other locations to the terminated employees. This is analagous to the offer of comparable employment contained in the legislative proposals.

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[13] 250 NLRB No. 58 (1980).

[14] 242 NLRB No. 72 (1979).

Congress has held numerous hearings and accumulated vast amounts of data prior to taking any action on the issue of plant closing controls. It appears that the NLRB believes this legislative process to be a waste of time and unnecessary.

There is another case in which the NLRB has "legislated" a remedy that Congress has rejected. In Florida Steel Corp.,[15/] Chairman Fanning and Member Truesdale (Member Murphy disagreeing) granted the remedy of "equal access" to the union. The employer was ordered to grant equal time to the union for reply at any plant where a company official spoke to a group of employees regarding the question of union representation. A similar provision was contained in the controversial labor law "reform" proposal which Congress rejected in 1978.

Upon review by the 5th Circuit Court of Appeals,[16/] the NLRB was again reminded that its orders are not to be punitive, and must not expand the law, the court holding that "In requiring this access to be provided at plants where the Steelworkers Union is not a bargaining representative ... the Board's order cannot be viewed as remedial ..." This mirrors Member Murphy's concern that the "equal access" order would, in effect, force the employer to finance a union organizing campaign.

The U.S. Court of Appeals for the District of Columbia Circuit is currently reviewing three NLRB decisions[17/] that have far-reaching implications. The issue before the Court concerns orders issued by Chairman Fanning, Member Jenkins, and Member Truesdale that would require an employer to release confidential fair employment practices information, such as affirmative action and hiring practice data, to the union.

Member Murphy's cogent dissents, demonstrating her awareness of cost and confidentiality factors, as well as the possibility that the unions may seek the information for use in legal "fishing expeditions," sum up the problems generated by the NLRB orders.

In White, Murphy expresses concern about "... my colleagues infringement into matters properly left to the expertise of the Equal Employment Opportunity Commission ..."

[15/] 242 NLRB No. 195 (1979).

[16/] Florida Steel Corporation v. NLRB, ____ F.2d ____ (1980).

[17/] General Motors, 243 NLRB No. 19 (1979).
White Farm Equip. Co., 242 NLRB No. 201 (1979).
IUE (Westinghouse Elec. Corp.), 239 NLRB No. 19 (1978).

And in the General Motors case, Member Murphy points out that "although there is a great deal of awareness in the United States these days as to the cost of regulation, evidently there is not enough," referring to the great costs imposed on the employer in complying with the Board order.

Another example of the NLRB's creativity in manipulation of the labor laws and precedents so as to make union organizing easier is illustrated in Woelke & Romero, 239 NLRB No. 40 (1978). The Board, with Member Truesdale in agreement, held that provisions obtained by a union from a contractor (which precluded the contractor from assigning jobsite work to any subcontractor which did not have a current labor agreement with that union) would be an invalid "hot cargo" agreement but for the construction industry proviso contained in the NLRA. The effect of this holding is to allow "top-down" organizing. That is, pressures brought to bear on the contractor during negotiations with the union may result in a provision guaranteeing organization of subcontractors. Indeed, a subcontractor may be hard-pressed to find work unless organized by the signatory union. Further, under the NLRB ruling, the subcontracting restriction would apply even if the contractor had no signatory union members employed on a jobsite where the subcontracting might occur.

Woelke and a companion case [18/] were recently reviewed and reversed by the 9th Circuit Court of Appeals, holding that the Supreme Court decision in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975) was too loosely interpreted by the NLRB. To allow the Board interpretation would have permitted restraints upon competition among subcontractors by eliminating wage competition.

D. NLRB Creates Own Increased Workload

Much is heard regarding the huge caseload of the five-member NLRB, and there have even been legislative proposals aimed at increasing the number of members. The fact is, the Board itself is often to blame for its increased workload.

[18/] Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, 239 NLRB No. 43 (1978).

In one of his earliest decisions as Board Member, Mr. Truesdale cast the deciding vote in *General Knit of California*,[19] thereby reversing a case (*Shopping Kart*)[20] decided less than two years earlier. The issue involved NLRB investigations of alleged misleading campaign propaganda. Under *General Knit*, the Board returned to a standard under which it will investigate the truth or falsity of statements made during the heat of a union organizing campaign. Refusing to believe that employees who vote to accept or reject a union are mature enough to recognize and evaluate campaign rhetoric for what it is, the Board decided that the rights of employees are best protected by inserting additional delays into the election process. A final decision as to whether propaganda is true or false, and if false, its effect on employee voters, can delay certification of election votes for over two years. This policy adds to the congestion of an already crowded NLRB calender, without a corresponding increase in voter protections. *Shopping Kart* would have allowed an election to be set aside if the manner in which propaganda was presented was such that its identity as election puffery was in question.

Time saving precedent was also reversed in *Suburban Motor Freight, Inc.*, 247 NLRB No. 2 (1980) by Members Truesdale, Fanning and Jenkins. This case held that the NLRB will no longer defer to an arbitrator's decision in a discharge or discipline case without proof that an unfair labor practice, alleged by the employee subsequent to the arbitration proceedings, had been considered and decided by the arbitrator.

As Member Penello's dissent pointed out, all parties agreed that the arbitration proceeding was fair and regular, the parties had agreed to be bound by the decision, the decision of the arbitrator was not repugnant to the purposes and policies of the law, and the grievant was in no way prevented from raising the issue of the unfair labor practice at the arbitration proceeding. Furthermore, in order to determine whether "just cause" existed for the discharge, the arbitrator had to consider any circumstances that would have supported the alleged discriminatory discharge unfair labor practice.

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[19] 239 NLRB No. 101 (1978).

[20] *Shopping Kart Food Market*, 228 NLRB No. 190 (1977).

Despite all this, the Board held that it would not defer to the arbitrator's decision, even though it subsequently dismissed the employee's complaint. Again, the NLRB created unnecessary work for itself and will continue to do so unless the Suburban Motor doctrine is reversed.

An additional real danger in Suburban, beyond increasing the NLRB's caseload, is that it gives a disgruntled employee two bites at the apple. The employee can take the discharge or discipline issue to arbitration, and dissatisfied with the result, raise charges before the NLRB. Significantly, less than three months before the Suburban Motor decision, the 9th Circuit Court of Appeals, in a similar case,[21] told the NLRB that "deferring" to arbitration was settled policy by the Board's own enunciations, and ordered deferral, reasoning that "the second bite would undermine the system of private arbitration consistently encouraged by the courts."

A most striking example of how the Board insists upon burdening itself while showing a lack of understanding of workplace realities is seen in the Clear Haven Nursing[22] case. Members Truesdale, Fanning and Jenkins again comprised the majority.

After a long strike, the employer and the union reached a settlement that was accepted by a 60-14 vote of the employees, and was subsequently approved by an administrative law judge. The union sought to withdraw unfair labor practice charges made during the dispute, and even testified that the wage rates negotiated took into account wages lost by employees because of the strike.

The NLRB, apparently deciding that the union, a local of one of the largest unions in the United States, was not sufficiently sophisticated to protect its members, rejected the settlement. In practical terms, this results in repudiation of an agreement negotiated at arms-length between competent parties, increased work for the NLRB, and leads to costly litigation for the parties. Ironically, the Board may eventually order the parties to negotiate in good faith, precisely what the parties had done voluntarily prior to NLRB intervention.

21/ Servair, Inc. v. NLRB, ____ F.2d ____, 102 LRRM 2705 (1979).

22/ Community Medical Services (Clear Haven Nursing), 236 NLRB No. 102 (1978).

The dissenting members, Murphy and Penello, sagely indicated that the majority, though only faced with alleged misconduct, treated the case as if it had already decided the merits. In any case, the will of the competent parties was subordinated to the desires of the NLRB majority.

CONCLUSION

The Chamber opposes the confirmation of John C. Truesdale. The decisions we have cited in which Mr. Truesdale has ruled in the majority portray the dangers of an agency which operates, not in the public interest, but in the interests of a special group. In order to restore the requisite balance to the NLRB, Mr. Truesdale should not be confirmed for an additional five-year term on the Board.

The decisions presented above are representative of Mr. Truesdale's positions. The attached appendix includes additional opinions in which Mr. Truesdale participated, and is offered in support of this testimony.

APPENDIX

The Singer Company - *Detroit Job Corps Center*, 240 NLRB No. 139 (1979).

The Salvation Army of Mass; *Dorchester Day Care Center and District 65, Distributive Workers of America*, 247 NLRB No. 62 (1980).

Evergreen Legal Services and Washington Legal Workers, 240 NLRB No. 146 (1980).

Community Services Planning Council/Area 4 Agency on Aging and Service Employees International Union Local 22, AFL-CIO, 243 NLRB No. 122 (1979)

Roman Catholic Diocese of Brooklyn, Henry M. Hold Association, Bishop Ford Central Catholic High School and Lay Faculty Association, Local 1261, American Federation of Teachers, 243 NLRB No. 24 (1979).

D. T. Watson Home for Crippled Children and District 1199P, National Union of Hospital and Health Care Employees, 242 NLRB No. 187 (1979).

Richboro Community Mental Health Council, Inc. and District 1199, National Union of Hospital and Health Care Employees, 242 NLRB No. 174 (1979).

ANKH Services, Inc., and Local 50, Service Employees International Union, 243 NLRB No. 68 (1979).

The Krebs School Foundation, Inc., and Local 925, Service Employers International Union, 243 NLRB No. 79 (1979).

United Services for the Handicapped and Retail Clerks International Union, Local 698, 239 NLRB No. 140 (1978).

Mon Valley United Health Services, Inc., and Pennsylvania Social Services Union, Local 668, SEIU, 238 NLRB No. 129 (1978).

Chicago Youth Centers and Local 372, SEIU, 235 NLRB No. 126 (1978).

M Restaurants, Inc., 238 NLRB No. 212

United Paperworkers, Local 12 (Duro Paper Bag Mfg. Co.), 236 NLRB 1525 (1978).

Montefiore Hospital, 243 NLRB No. 106.

Sure-Tan, Inc. and *Surak Leather Co*., 246 NLRB No. 134 (1979).

Int'l Technical Products Corp., and its subsidiary, Rel, Inc.: *Successors and Assigns of Rel-Reeves, Inc. and Parker-West Corp*.: *Successors and Assigns of Electronic Systems Div., Dynamics Corp. of America, 249 NLRB No. 523* (1980).

The East Dayton Tool and Die Co., 239 NLRB No. 20 (1978).

Automation & Measurement Division, the Bendix Corp., 242 NLRB No. 8 (1979)

The Bendix Corporation, 242 NLRB No. 170 (1979).

Kentile Floors, 242 NLRB No. 15 (1979).

Amalgamated Meat Cutters and Allied Workers of North America, Local 593, 241 N.L.R.B. No. 93 (1978).

Amoco Production Company, 239 N.L.R.B. No. 182 (1979).

Providence Medical Center, 243 N.L.R.B. No. 61 (1979).

The Paintsmiths, 239 NLRB No. 192 and United Brotherhood of Carpenters and Joiners, Local 49, 239 NLRB No. 191.

A.P.A. Transport Corp., 239 NLRB No. 165.

Roadway Express, 246 NLRB No. 28.

Brown Company, 243 NLRB No. 100.

Ad Art, Incorporated, 238 NLRB No. 139

Pincus Brothers, Inc., 237 NLRB 1063.

The CHAIRMAN. We have developed a panel after all. So we invite Mr. Francis T. Coleman, a member of the Labor Relations Committee of the National Association of Manufacturers, to testify. Panelizing now will also, hopefully, give us the opportunity for questioning with Senator Hatch present.

Mr. Coleman.

Mr. COLEMAN. Thank you, Mr. Chairman.

Mr. Chairman, members of the Labor and Human Resources Committee, I am Francis T. Coleman of the Washington, D. C. law firm of Pierson, Ball & Dowd. Appearing today on behalf of the National Association of Manufacturers, I wish to express my appreciation for the opportunity to testify at the confirmation hearing.

As you know, Senator, the National Association of Manufacturers, NAM, represents approximately 12,300 firms which employ a majority of the country's labor force and which produces over 75 percent of the Nation's manufactured goods. Eighty percent of our members are generally considered to be small businesses. In addition, NAM has more than 100 manufacturing trade associations as members of its associations department, representing over 30,000 firms and is further affiliated with another 128,000 firms through its National Industrial Council. Our members, quite obviously, benefit greatly from stable labor-management relations and from just and equitable interpretations of the law. As such, the decision this committee makes on the pending nomination will significantly affect the manufacturing community as a whole.

We appear before you today in opposition to Mr. Truesdale's reappointment to the National Labor Relations Board. Like the other witnesses, we do not question Mr. Truesdale's integrity whatsoever, we do question the decisions. We join with other representatives of the business community in urging you to carefully consider the currently deteriorating status of labor-management relations in this country today, the role the Board has taken in bringing about this decline and, in that context, the role in which Mr. Truesdale, as a Board member, has played in the evolution of this situation.

Mr. Truesdale, unlike other recent nominees for appointment to the NLRB, has a documented track record that is available for public scrutiny. He has served as a member of the Board since

October of 1977 when he was appointed by President Carter to serve out the term of member Peter D. Walther who had resigned. We have 3 years of his decisions as a basis for judging member Truesdale's ability to fairly carry out the overall purposes and objectives of the National Labor Relations Act.

Viewed from this perspective, we submit that Mr. Truesdale's decisions have neither demonstrated an allegiance to the principles of the NLRA, as amended, nor have they reflected an even-handed balancing of the competing interests which the act seeks to achieve. For these reasons, we believe that Mr. Truesdale's nomination should not be confirmed.

With the appointment of Mr. Truesdale 3 years ago, a "new majority," consisting of Chairman Fanning and members Jenkins and Truesdale has emerged. It is becoming apparent from the pattern of their decided cases that the decisions of this new majority: First, often extend the purview of the Board beyond its intended jurisdictional limits; second, reverse well-founded, time-honored precedents of previous Boards; third, ignore, if not outrightly snub, the mandates from the various courts of appeals, and finally fourth, encourage redundant litigation by refusing to defer to other equally competent, if not superior, forums for adjudicating these cases.

As evidence of the emerging trend, I would like to mention but a few of the cases which give our members cause for concern:

In *Suburban Motor Freight, Inc.*, member Truesdale helped form the majority which decided that the Board will no longer honor the results of an arbitration proceeding in discharge or discipline cases unless any unfair labor practice issues were presented to the arbitrator and considered by him. This case, decided by a Board majority of Chairman Fanning and members Truesdale and Jenkins, reversed 6 years of Board policy. The real danger, as pointed out by former NLRB Chairman Edward Miller, in *Suburban Motor Freight* and related cases, beyond unnecessarily increasing the NLRB caseload and undermining a perfectly appropriate and cost-effective method of resolving issues, is that "any discharged employee can have a second bite at the apple pit if he is smart enough not to make an 8(a)(3) claim until after the just-cause award is in."

This again contributes to the cost of doing business of our NAM member companies if they have to go through the whole process of arbitrating a discharge or disciplinary type claim only to find they are back in a court of appeals over a discharge case.

Again, member Truesdale, as part of the new Board majority has also made it more difficult for labor and management to resolve their own disputes without NLRB interference. The Board's cavalier treatment of unfair labor practice settlements by the parties is demonstrated by such cases as *Clear Haven Nursing Home* and *Roadway Express, Inc.* This repudiation of agreements negotiated at arms length between competent parties not only increases the workload for the NLRB but also results in unnecessarily costly and unwanted litigation by the parties.

This is a case in which the union and all parties involved agreed that the case be settled, yet the NLRB persisted in ruling on the case and keeping it alive.

In the health care area, Federal courts have been consistently admonishing the Board majority that the congressional admonition against proliferating bargaining must not be ignored. In spite of repeated judicial reprimands, the Board majority has consistently ignored the holdings of appellate courts throughout the country. This flaunting of appellate court directives has recently led one court to accuse the Board of "operating outside the law."

The current Board has also granted unprecedented "discovery rights" to labor unions without regard to their reasonableness, the burdensomeness of their requests on management or their impact on the confidentiality of the data involved. Such cases as *White Farm Equipment Co., General Motors Corp., Westinghouse Electric Corp.*, and a host of others give management cause for grave concern over the direction the Board is taking in this area.

Likewise, this Board's efforts to expand the concept of concerted protected activity to include almost every conceivable individual action, has greatly restricted management's ability to take swift and decisive disciplinary action in appropriate circumstances. Employers are repeatedly being forced into expensive litigation over simple discharge cases as the Board encourages individual employees to claim nonexistent protection under the act. Member Truesdale's adherence to this view is another source of great concern to our members,

And, finally, the last case that we would like to highlight deals with the equal access provisions which I mentioned earlier. The equal access provisions of the labor law reform legislation were, in our estimation, one of the major reasons why this legislation was defeated. Yet, the Board, with Mr. Truesdale in the majority, has sought to reintroduce the equal access approach through its remedial powers. Fortunately, this effort was vetoed by the fifth circuit, which reminded the Board that it is not empowered to monitor on a continuing basis the activities of a company to impose on a periodic basis additional requirements because of a past violation.

In conclusion, these cases illustrate the direction which the "new majority" is taking. In our opinion, they do not bode well for stable labor-management relations in the coming decade. Instead of addressing the most critical labor law issues of the day, and approaching them in a fair and balanced manner, the new majority has embarked upon a course of action which has led to stern rebukes from various appellate courts and critical comment from labor law authorities generally.

We submit that Board members are needed who will work to improve the administration and interpretation of the Act, who will strive for balanced decisionmaking and, finally, who will not unnecessarily interfere and impede the ability of employers to productively and efficiently run their businesses. In our estimation, Mr. Truesdale does not meet these criteria.

Consequently, we submit that this committee should not recommend Mr. Truesdale's renomination.

Thank you very much.

The CHAIRMAN. Thank you, Mr. Coleman.

Senator Humphrey?

Senator HUMPHREY. Thank you, Mr. Chairman. And welcome, gentlemen.

I would like to direct the questions to Mr. Thompson.

I state at the outset, I have no expertise in labor law but would like to establish certain matters for the record.

Mr. Thompson, I am particularly concerned with equal access remedies which the NLRB seems to be imposing upon employers. I know that Mr. Truesdale has participated in the majority in the *Florida Steel* case, and the *United Dairy Farmers* case.

In both of these cases, equal access to the union was granted. Can you describe the position of the chamber on equal acess?

Mr. THOMPSON. Yes, Senator Humphrey. And I would be delighted to do so.

On the way up here to the Senate Office Building, we passed a building that has an inscription on it, which says, "History is Prologue." And I heard a cab driver once say, "What that really means is, 'You ain't seen nothing yet.' 'I think that is the way I could describe those cases. We view those cases as simply the forerunners of a trend in Board decisions which will put into place equal access first as a remedy in cases which now are considered extreme, but which will be considered commonplace cases in the years to come.

Second, we see this effort on the part of the Board—or not effort—this movement on the part of the Board, as a part of an overall effort to enact through the decisionmaking process what the Congress did not enact in what we know as labor law reform and what we all remember as the fight over that aborted effort to change the labor laws that the chairman referred to.

We view equal access two ways. No. 1, we view equal access as an attempt or a goal on the part of organized labor and its supporters, both in the Congress and on the Labor Board, as an effort and a part of an overall effort to take the employer out of the campaign; to sideline the employer, so to speak.

I recall once I was involved in a television debate with Mr. Winpisinger who is the president, rather outspoken president of the Machinists Union, and a fine man. I admire him for his candor, particularly. He made the statement in the course of that debate that equal access and some of the other provisions then red hot on labor law reform were designed to put the employers who come under the jurisdiction of the National Labor Relations Act in the same position that employers are under in the Railway Labor Act, which he said was his ideal for a labor law.

You probably know, under the Railway Labor Act, an employer is not permitted to participate in an organizing campaign or oppose the union's efforts to organize the workers. Everybody knows, I guess, that the railroads are all practically closed shops as a result of that.

There are more recent developments in the overall labor field which I think underscore the importance of such things as silencing the employer. The statistics on labor board elections are running in the range of 40 to 45 percent success ratios for unions in NLRB secret-ballot elections, one of the lowest in years for success of the unions. That is where you come under the National Labor Relations Board and its act.

The percentage unions are experiencing under the Federal procedures for Federal employees where the Federal Government started out with a nonresistance pact, as we sometimes refer to it, which is the same thing you have in the Railway Act, the employer is silenced is much higher. In other words, the percent in the elections, according to my research—and it was not easy to come by—is well over 90 percent.

So the victory ratio is twice in the noncontested elections than in the contested elections by employers. That may bring a cheer from the galleries of labor supporters because that supposedly means something good. But I would say it means the voters are not being given an opportunity to hear both sides; and there are two sides of the question of whether you want to be represented by a union. I would say it is certainly contrary to the basic precepts, one which this country was founded upon, and that is, we should live by majority rule.

What does that have to do with equal access?

When an employer is faced with the threat of equal access, either by virtue of the fact that he might unwittingly or unintentionally engage in some unfair labor practice activity, he is less likely to avail himself of his current rights to speak out against the union for fear that he will trigger the equal access remedy that the Board has now put into place.

If we had equal access under labor law reform, for example, it was clearly designed to say to the employer, if you do not want the union to come on your premises and have access, then you better keep your mouth shut. That is where equal access is important.

It is also important to the small employer from the standpoint of simply maintaining the authority and the discipline and the orderliness of his business. If you have got union business agents coming onto your premises to make speeches to your employees or to use your bulletin boards or whatever, it is awfully hard even to conceive of a man, particularly a small employer, being able to run his business. These are among some of the many reasons that we have to be opposed to equal access.

We see these decisions, like *Florida Steel* and the others, albeit they are surrounded with the trappings of unfair labor practice findings, so forth, we see those decisions as the first step down the road putting into place the labor laws in this country by Board decisions rather than by legislation and a very major change in the balancing of the labor laws. That is the reason we are so strongly opposed to what has become commonly known as equal access.

I know you did not particularly want a speech, but I felt the record ought to be clear on our position on equal access. People sometimes say that that is just a cliche. I notice we have been criticized for opposing equal access as some kind of bogey man, but we see it as a serious threat to the ability of employers to be informed on issues that lead to their choice of representation in these elections.

Mr. COLEMAN. I think it should be noted that historically earlier boards struck a balance in this equal access question by giving labor unions the Excelsior list where they had the list of all the employees eligible to vote in the union. That was considered by earlier Boards to be the equivalent response to the union should not require equal access. That is where earlier Boards struck a balance. Now it appears that the new majority, as we term it, is coming back and trying to restrike the balance in a way more favorable to union organizing attempts.

Mr. **Thompson**. I am not sure I followed the questions and answers when Senator Hatch was questioning on this point. But I think the question was asked, isn't this something new in the labor laws? I recall years ago, probably before most of the present Senators were sitting in the Senate, there was an effort by an early Labor Board to put equal access into place under—this goes back to the fifties, and this will qualify me as a scholar, Senator Williams.

I wrote an article on this subject. It involved what we called the Bonwit Teller rule, where an early board in the fifties attempted to put equal access into effect; and the court of appeals slapped them down quickly on the basis that that was not a proper procedure for them to put into place.

I would predict that the courts will take a dim view of this present effort, but who is to know?

Senator **Humphrey**. Let me just say that I have no objection to your explaining yourself fully. It is something of an education to me. I am certainly willing to give Mr. Truesdale equal time.

I see my time is up.

The **Chairman**. All right.

I will pick up here.

Let's enter a little discussion here on some history. And we will deal with Mr. Coleman and Professor Thompson.

Professor, in your testimony, you cited percentages—Mr. Coleman, I want you to listen—percentages of cases where the Board's order has been enforced in full. And it is contended by Mr. Coleman that that recent drop in the figure to 64.5 percent somehow reflects on the Board's impartiality. I wonder if you could search back in history and tell me when you think in the entire history of the Board, the enforcement rate was at its lowest?

Mr. Coleman?

Mr. **Coleman**. I recall some figures somewhere in one of the statements that it was the lowest in the early sixties.

Are those the figures you are referring to, Senator?

The **Chairman**. Well, I have some figures that show that that is exactly right.

Do you agree that those were—that was the period of the entire history, the record low in enforcement orders?

Mr. **Thompson**. I would not doubt that. I do not have the statistics before me, but that would make a lot of sense because that is when we had the last union-dominated board, as I recall. We had a chairman, appointed by President Kennedy, who went on a rampage. McCulloch; that was his name. And the courts took him on.

We are going through that same cycle right now. We are just at the early stages of it.

The **Chairman**. This was 1960, 1961. And I will have to tell you that at that time, the Board was composed of five members appointed by President Eisenhower and three of them were Republicans. I want to spoil your day. It is a fact.

Mr. **Thompson**. That is all right. You have done that many times. [Laughter.]

The **Chairman**. I did not intend to spoil another day.

Mr. **Thompson**. That is more like it.

I think if you followed the statistics on through you would see the McCulloch record was worse than the recent record of the Board. But I do not have the statistics here. I do recall that the McCulloch Board had a fairly bad track record in court enforcement. Of course, they plowed a lot of new ground. They came in and reversed a lot of cases already decided by this same Board you just referred to.

I think our present Chairman Fanning was a member of that Board you referred to. He was appointed by President Eisenhower, as I recall.

Mr. Chairman, if you feel more comfortable referring to me as professor, I did, at one time, teach law at the Emory University in Atlanta so feel free to refer to me that way if it makes you feel better.

The CHAIRMAN. Are you one of those eggheads? [Laughter.]

Mr. THOMPSON. I have not been accused of that lately.

The CHAIRMAN. Well, the point I made, for whatever its significance, does show 1960 to 1961 to be the lowest point, is that right, of Board orders, and the Board was made up then, as I indicated, of three Republicans and three Democrats. The Chairman was Boyd Leedom. McCulloch did not come on until well after that.

Mr. THOMPSON. Right after that. McCulloch came on in about 1961 or 1962; 1961 I believe.

The CHAIRMAN. He came on, yes, during 1961.

Mr. THOMPSON. But you had the present Chairman, Fanning, was a sitting member at that time. He was one of the Democrats.

The CHAIRMAN. McCulloch's term as Chairman began in 1961 and we do not have figures on Board orders—the computer shows that during Chairman McCulloch's term of office the enforcement order record improved and steadily improved until the point where the orders enforced in full went to 68 percent at the end of the term.

Mr. THOMPSON. After he left and the next Board began, if you can call the Board or characterize the Board by their Chairman, I think you would see a fairly steady rise in enforcement records up until about 2 years ago, a year ago even, and then it has begun to drop again.

And the point we are trying to make is it took a dramatic drop in the last 12 months, 10 points.

The CHAIRMAN. Still it shows a 20 percent better enforcement record today than during that Eisenhower Board that I first indicated.

Mr. THOMPSON. No, I do not think that is correct, sir. I think it did last year, perhaps, but it has dropped down 10 points from that. I think it is like one of these recessions, Mr. Chairman.

The CHAIRMAN. The last figures we have here, 64.6 percent and the low point was in 1960, 43.2 percent. So it is still a better picture.

Mr. THOMPSON. I think if you looked at the trend up to that 40 percent it probably was pretty low all the way through there. I can recall even before I started practicing labor law which was before most people in this room were born, the Labor Board was looked on as a kind of an outlaw agency.

In the early days of the Labor Board the district courts used to enjoin their proceedings before the Supreme Court decided they were constitutional. The Labor Board had not always enjoyed the high respect that Senator Hatch expresses for it here today as I am sure you know.

The CHAIRMAN. It had tumultuous early years.

Mr. THOMPSON. Yes, sir.

The CHAIRMAN. Great divisions within the Board.

Mr. THOMPSON. Yes, sir. In seriousness, the thing that we are concerned about at the chamber and other business interests, I believe, is that the Board had gone through a 10-year period of attaining a level of respectability and acceptability on the part of both labor and management which has led to these improved statistics and which has led, I think, to better labor-management relationships in this country, and we see a definite turn away from that that is alarming to us, and that is one reason we are here today.

That is one reason we were here when Lubbers and Mr. Zimmerman were proposed, because we think there is a positive, calculated effort to change what has been achieved over all of these years.

And we want the Senate to take note of that. We want the Senate to recognize its responsibility to do more than just see if a fellow is a good guy which we concede Mr. Truesdale is, and look at what kind of a Board is going to set labor policy in this country, and that is what these people do.

The CHAIRMAN. All right. I promised to put some statements from quarters associated with the business community, and I was going to do it now, but I see the ember is on. Without any objection I will extend a minute or two.

Addressed to me is a letter of August 13 from Harry L. Browne, who is one of the senior partners of Spencer, Fain, Britt & Browne, Kansas City, Mo.

> DEAR SENATOR WILLIAMS: I am enclosing copies of four letters I sent to Senators Thomas F. Eagleton, Orrin G. Hatch, Gordon J. Humphrey and John C. Danforth July 29th concerning the reappointment of John C. Truesdale as a member of the National Labor Relations Board.

And in the letters he said to the Senators I have indicated:

> I read in the press that you hope to block the nomination of Democrat John Truesdale, whose term as a member of the National Labor Relations Board expires in August. If this is the case, I would respectfully request that you reconsider such action.
>
> I have been a practitioner in the labor law field for some 30 years representing employers exclusively, and I am fully aware of the problems confronted by employers. I have written many articles on labor law and the NLRB and have testified on numerous occasions before Congress on proposed labor legislation on behalf of management.
>
> Though I consider myself an independent, some people regard me as a Republican. Because of this background, I feel I have a particular right to speak out. I have known John Truesdale professionally for some 15 to 20 years.
>
> While he served as assistant, then as executive secretary of the Board and presently as a member of the Board, his service has always been outstanding. I have also studied his decisions carefully and the rationale employed by him in rendering decisions since he became a member of the Board. I cannot, of course, always agree with him, but I have always found John Truesdale to be objective, intelligent and knowledgeable, interpreting the law as he sees it without bias and with understanding, giving his best efforts in the public interest.

Such a man deserves renomination. Whoever may win the presidency, I would still endorse John Truesdale as having, by his record, earned another term with the Board. I would hope that you would give him your favorable consideration.

Very truly yours,

HARRY L. BROWNE.

And I will include in the record the letter to me in which Mr. Browne included a copy of the letter to various Senators that I mentioned.

[The letters referred to follow:]

SPENCER, FANE, BRITT & BROWNE

BYRON SPENCER (1883-1964)

IRVIN FANE
JAMES T. BRITT
HARRY L. BROWNE
JOSEPH J. KELLY, JR.
WILLIAM H. WOODSON
ROBERT P. LYONS
RICHARD H. SPENCER
DONALD W. GIFFIN
LOWELL L. SMITHSON
MAX H. BERGMAN
JAMES R. WILLARD
SAD SMITH
EDWARD A. SETZLER
RICHARD W. SCARRITT
JACK L. WHITACRE
BASIL W. KELSEY
JEROME T. WOLF
MENDEL SMALL
JAMES H. WHITTIER
JAMES C. BAKER
CARL H. HELMSTETTER

E. J. HOLLAND, JR.
JAMES W. KAPP, JR.
FRANK B. W. McCOLLUM
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IN REPLY, PLEASE REFER TO
FILE NO.

August 13, 1980

The Honorable Harrison A. Williams
Senator from New Jersey
Chairman, Senate Committee on Labor
and Human Resources
Senate Office Building
Washington, D. C. 20510

Dear Senator Williams:

I am enclosing copies of four letters I sent to Senators Thomas F. Eagleton, Orrin G. Hatch, Gordon J. Humphrey, and John C. Danforth on July 29, 1980, concerning the reappointment of John C. Truesdale as a member of the National Labor Relations Board.

As you will note, I am a long-time labor lawyer representing management, and I am in favor of Mr. Truesdale's renomination because he has performed his duties as a member of the Board conscientiously, objectively, with independence, and with full understanding of the problems of labor-management relations.

Since Mr. Truesdale's renomination will soon be the subject of committee hearings, I respectfully request that my views as expressed to you and the other Senators be made a part of the record.

Thank you very much for your consideration.

Very truly yours,

Harry L. Browne

HLB:hm
Enclosures

July 29, 1980

The Honorable Gordon J. Humphrey
Senator from New Hampshire
Senate Office Building
Washington, D. C. 20510

Dear Senator Humphrey:

I have read in the press that you hope to block the renomination of Democrat John Truesdale, whose term as a member of the National Labor Relations Board expires in August. If this is the case, I respectfully request that you reconsider such action.

I have been a practitioner in the labor law field for some 30 years, representing employers exclusively, and I am fully aware of the problems confronted by employers. I have written many articles on labor law and the NLRB, and have testified on numerous occasions before Congress on proposed labor legislation on behalf of management. Though I consider myself an Independent, some people regard me as a Republican. Because of this background, I feel I have a particular right to speak out.

I have known John Truesdale professionally for some 15 to 20 years. While he served as Assistant and then as Executive Secretary of the Board and presently as a member of the Board, his service has always been outstanding.

I have also studied his decisions carefully and the rationale employed by him in rendering decisions since he became a member of the Board. I cannot, of course, always agree with him, but I have always found John Truesdale to be objective, intelligent, and knowledgeable, interpreting the law as he sees it, without bias and with understanding, giving his best efforts in the public interest.

Such a man deserves renomination. Whoever may win the Presidency, I would still endorse John Truesdale as having by his record earned another term with the Board. I would hope that you would give him your favorable consideration.

Very truly yours,

Harry L. Browne

HLB:hm

The CHAIRMAN. And then additionally, and this gives me a great deal of pleasure to quote from the Washington Star of Thursday, August 14. The pleasure I have is that it contains the quoted statement of a person that I have had a great deal of respect for though I have often found myself on opposite sides of labor issues here and on the floor. He is a man whose nomination as General Counsel I presided over, despite our disagreement on many things.

The person I refer to is Peter Nash who has said, "'When Truesdale was first appointed, he won the support of labor and management, and what he has done to date warrants that continued trust and confidence,' said Peter Nash a former," I am quoting from the Washington Star, "said Peter Nash a former solicitor for the Labor Department and former NLRB general counsel."

Quote, "You cannot fairly characterize his decisions one way or the other," end of quote, Nash said. I will continue with a bit of the Star report.

"Nash, who opposed the Lubbers nomination said he strongly supports Truesdale's bid for renomination. Nash said," still quoting from the newspaper article now. "Nash said he was surprised to hear of the opposition to Truesdale, but, quoting Nash, 'I guess some conservative Members are saying they ought to hold it up at least to see if it is OK with Governor Reagan. Well, I feel that I would be equally delighted to support Truesdale as a Reagan nominee to the NLRB as I am supporting him as a Carter nominee.'" End of quotation. That will be included in the record.

[The information referred to follows:]

Thursday, August 14, 1980

The Washington Star

Battle Heats Up Over NLRB Nomination

Business Community Opposes Truesdale

By Lance Gay
Washington Star Staff Writer

In the last three years, business groups have led a charge up Capitol Hill to head off what they see as efforts by the Carter administration to change the complexion of the National Labor Relations Board.

And now the Chamber of Commerce and other business organizations are preparing to mount a potentially bloody battle in an effort to hold up the renomination of John Truesdale to another five-year term on the board.

But this time — given the press of last-minute business on Capitol Hill and the threats of a Republican filibuster — some Hill observers predict the business community might win.

The fight over the Truesdale nomination comes fast on the heels of the two bitter fights between labor and business this year: one over the appointment of William Lubbers to be NLRB general counsel and the other over the appointment of Don Zimmerman to be an NLRB member.

Business lost both fights, heightening the tension over the Truesdale nomination, which has taken on a symbolic meaning for labor and business.

Before Lubbers and Zimmerman could be approved, the Senate had to stop a filibuster led by Sen. Orrin Hatch, R-Utah. Hatch is the same senator who led the successful filibuster against the Carter administration's labor law reform bill two years ago — legislative changes in the 1935 Wagner Act that would have simplified and speeded up union certification elections.

Because of the defeat of that reform bill, Hatch maintains that the administration is now trying to bring about some of the changes outlined in the legislation by administrative action.

And if Truesdale's nomination is sent to the Senate floor later this month, Hatch vows a repeat performance of his filibuster efforts. President Carter sent the Truesdale nomination to the Hill last week just hours after the Hatch filibuster was broken.

"I'm extremely concerned that the board not be overbalanced by either side," said Hatch, contending that Truesdale is tilted towards labor's side.

"Unless we demand quality neutral candidates, the appointment of people like John Truesdale is going to cause the destruction of the reputation of the NLRB," Hatch insisted.

The Chamber of Commerce supports Hatch's contention.

"The Chamber is going to oppose the Truesdale nomination based on the knowledge and on the grounds that he is not a balanced member of the board," said John Tysse, the Chamber of Commerce labor law specialist.

The Chamber has been combing through NLRB decisions as it puts together a bill of particulars of its opposition to Truesdale.

Truesdale, however, bitterly disputes charges of bias for any side, and points out that he has come under attack from unions for some of his decisions.

"How do you defend yourself against something like that — it's just not true," Truesdale said in an interview last week. "I've been a balanced board member. I haven't been a partisan or a biased person. It sounds trite, but I call them as I see them."

JOHN TRUESDALE

"When he (Truesdale) was first appointed he won the support of labor and management — and what he's done to date warrants that continued trust and confidence," said Peter Nash, a former solicitor for the Labor Department and former NLRB general counsel. "You can't fairly characterize his decisions one way or the other," Nash said.

Nash, who opposed the Lubbers nomination, said he strongly supports Truesdale's bid for renomination.

Truesdale is aware of the opposition awaiting him on Capitol Hill, but said that he has not attempted to counter it by gathering supporters to his side.

"I'm resigned to it if it is turned down," he said, explaining that he believes it "unseemly" for him to lobby for reconfirmation. If he is not confirmed for a second term, he said he will leave government service.

"From what everyone is saying, I guess I will have difficulty," he said. "But I haven't had any first-hand evidence of management opposition and if there is political opposition, I don't know of it because I don't travel in those circles."

Truesdale, 56, was a career NLRB employee and executive secretary of the agency until Carter first appointed him to a seat on the board in 1977. That seat will become vacant Aug. 27.

Hatch said another reason he opposes the renomination is the timing. If Ronald Reagan is elected this fall, he should have the right to propose his own person, said the senator.

"We've got to be a little stiffer on all these appointments at this time of the year — and rightly so," said Hatch.

The Carter administration argues that the Senate has to approve a person for the seat and maintains that it would be improper to leave the board with only four members for the remainder of this year.

Nash said he was surprised to hear of the opposition to Truesdale, but "I guess some conservative members are saying they ought to hold it up at least to see if it's okay with Gov. Reagan. Well, I feel that I would be equally delighted to support Truesdale as a Reagan nominee to the NLRB as I am supporting him as a Carter nominee," Nash said.

Mr. **Thompson**. Mr. Chairman, can I comment very briefly on those two?

The **Chairman**. Sure.

Mr. **Thompson**. One was a letter. The other seemed to be a newspaper article. Am I correct?

The **Chairman**. These were quotations within the newspaper article, yes.

Mr. **Thompson**. Were they quotations from a letter or a position statement? I am not sure on that.

The **Chairman**. I think the source was what Mr. Nash told a Star reporter and a story was developed out of material from that source.

Mr. **Thompson**. The letter from Harry Browne is a letter to the Senator. The other quotation was a newspaper story from Pete Nash.

The **Chairman**. That is exactly right.

Mr. **Thompson**. If I could just comment. I happen to know both of those gentlemen very well and have a high regard for both of them. There are about 10,000 plus management lawyers in this country and they are 2 of them.

The **Chairman**. Well, we do not promote a campaign of solicitation. In this regard, we sit here and receive information. I do not think we have promoted in any way a response, have we, for this nomination.

Therefore, we do not develop a great quantity of opinion from the country. What we get we have to look at in terms of its quality. You have attested to the high quality of those statements that I have included in the record, Mr. Browne from Kansas City, Mo., and Peter Nash, whom we all know has eminence in the field of labor-management relations on the employer side in addition to a very distinguished career at the National Labor Relations Board.

Mr. **Thompson**. Both of those men are recognized, prominent management lawyers as are 10,000 other management lawyers in this country. There are five sitting before you and several behind you whom I consider to be equally as prominent and equally as qualified to speak. So if you want to count heads, you got about 10 to 2, as I see it, for whatever it is worth.

Senator **Hatch**. It might be 10,000 to 2.

Mr. **Thompson**. Well, it very well could be. We do not solicit letters either. We will if you like, if that is the way you are going to judge these things.

The **Chairman**. No. As I say, it has not been our practice to go out and seek support for these nominees.

Mr. **Thompson**. Well, neither have we.

The **Chairman**. We wait and see what develops.

Mr. **Thompson**. I do not see the value——

The **Chairman**. As far as I am concerned, it is you and Mr. Harry Browne in disagreement and Mr. Coleman in disagreement with Peter Nash.

Mr. **Thompson**. It is not the first time that I have disagreed with Harry Browne and Pete Nash, but I do not think that has anything to do particularly with this proceeding other than the fact you found two guys who are probably good friends of old John and decided to write a letter for him. Well, happy days.

Senator HATCH. Well, you are a good friend, too, are you not?

Mr. THOMPSON. I consider myself a very good friend of John. I had mentioned to him earlier in the day I have a picture of him in my playroom where he and I were standing at a party and a picture was snapped.

I also have a picture of you, Senator Williams, and you, Senator Hatch, where we were right over here on the side of this podium or whatever you call that thing you sit behind, shaking hands with one another. So I consider all of you friends of mine.

I do not know that that contributes anything to whether Mr. Truesdale ought to be confirmed or not. It might put all of you in question. [Laughter.]

The CHAIRMAN. I would say that I think both of these statements go to substance rather than the nonrelevant factors of whether someone is personally liked and personally a friend. This goes to the essence of what we would hope would be the position of the writer.

Senator HATCH. Well, not really, Mr. Chairman, because they are not here to testify about the cases that have been decided. That is the ultimate essence of whether or not Mr. Truesdale should be renominated, and frankly, I believe these gentlemen are here to testify and have given us some information pertaining to what they consider to be antithetical cases to a good labor-management balanced relationship.

The CHAIRMAN. Well, the way I read Brown here he goes to the essence as well as you go to essence here and not the personality of the nominee. When he says, "interpreting the law as he sees it," he is referring to Truesdale, of course, "without bias and with understanding giving his best efforts in the public interest."

That has nothing to do with whether Mr. Truesdale is a good guy or whether he is not.

Mr. COLEMAN. All that we can say, Senator, is that he must read the cases differently than we have, because we have attempted to provide the committee with a detailed analysis of many of the cases where we think the balance has been tipped unfairly on the scale.

And I think these other gentlemen that you refer to, if they would present their detailed analysis, then we could debate the point.

Mr. THOMPSON. I am going to send Harry Browne a copy of my testimony and ask him if he agrees with it and if he does, I will let you know.

The CHAIRMAN. All right.

Mr. THOMPSON. I think he was just waxing eloquent in his letter, if you will pardon my observation.

The CHAIRMAN. He was strictly a volunteer as it appears from the record.

Senator HATCH. Maybe he will come in here and testify and tell us if he agrees or disagrees with the chamber's testimony. I think that is the ultimate way to find out whether he really does feel as strongly as the letter seems to indicate.

The CHAIRMAN. Well, we could have a seminar on some of the cases that you have raised and there will be time to go into some of them.

Mr. THOMPSON. Perhaps someone could determine from Mr. Truesdale whether Mr. Browne and Mr. Nash were solicited to support his nomination.

The CHAIRMAN. I missed your point. Solicited by whom?

Mr. THOMPSON. I said perhaps Mr. Truesdale could inform the committee as to whether Mr. Browne or Mr. Nash was solicited.

The CHAIRMAN. A fair observation.

Senator HATCH. Or whether he talked to them.

The CHAIRMAN. And Mr. Truesdale is on his feet. Will you respond to that?

Mr. TRUESDALE. I would be happy to, but just, first, to clear up a slight technical point. That clipping is from the Washington Star. The Daily Labor News is simply an in-Board service that distributes newspaper clippings.

Senator HATCH. Did you provide that to the chairman, Mr. Truesdale?

The CHAIRMAN. My copy here shows Daily Labor News. I thought it was taken from——

Mr. TRUESDALE. That is what the information service is. It sends around clippings. I may have supplied it to you.

The CHAIRMAN. So they have nothing to do. They supplied the Washington Star to us.

Mr. TRUESDALE. That is right. That is a quote to the reporter. Now, Mr. Chairman, would you read the sentence in there quoting me, talking to Lance Gay, about my feeling of soliciting support?

Mr. THOMPSON. Why do you now just put that in the record?

Senator HATCH. I have no objections.

The CHAIRMAN. Where is that? I read this and I know it is here.

Senator HATCH. Mr. Truesdale, if you did not solicit support, you would be the first one in the history of this game that did not so I do not have any objection toward you doing it. I hope you can bring in 5,000 of the 10,000 management lawyers to say you did a terrific job.

Mr. TRUESDALE. Senator Hatch, I did not——

Senator HATCH. If you do that, I will support you myself.

Mr. TRUESDALE. I did not solicit support because I consider it unseemly for a Board member to be lobbying among the people who appear before him to come and support him in such a situation as this.

Harry Browne sent that letter out of the blue, and Peter Nash I have not spoken to about my nomination. When the reporter of the Washington Star said——

The CHAIRMAN. All right. Now, I will read it just as it was.

Senator HATCH. Well, we may get into that, Mr. Chairman.

The CHAIRMAN. "Truesdale is aware of the opposition awaiting him on Capitol Hill." This is the Star, the same Star story that I had used on quoting Nash.

"Truesdale is aware of the opposition awaiting him on Capitol Hill but said that he has not attempted to counter it by gathering supporters to his side."

Mr. Truesdale is then quoted, " 'I am resigned to it if it is turned down,' he said, explaining that he believes it unseemly for him to lobby for reconfirmation. If he is not confirmed for a second term, he said he will leave Government service."

Mr. THOMPSON. Mr. Chairman, I suggest to you that in that same article is a quotation from Mr. Tysse, who sits at my right, expressing the opposition of the chamber to Mr. Truesdale's nomination. I also suggest to you that the publication which generated that piece of paper you have there is an internal news service of the National Labor Relations Board quoting from the Washington Star article.

I would also suggest to you, and Mr. Truesdale, I think, would probably verify this, that when Mr. Gay talked to him and he told him that he thought it would be unseemly and so forth, he was asked the question who could we talk to in the business community, and he said why do you not call Pete Nash.

I would like to hear his response to that.

Mr. TRUESDALE. Mr. Chairman, that story is from the Washington Star. I would ask, with your permission, it be put in the record. It is not generated within the Board's information office. It is from the Washington Star.

Lance Gay asked me why the business community opposed me and I said I do not know. I have not heard any evidence myself of opposition. Why do you not call up some of these people and ask them?

Mr. THOMPSON. Like Pete Nash.

Mr. TRUESDALE. He asked and that is the answer he got.

Mr. THOMPSON. Did he not get Pete Nash's name?

Mr. TRUESDALE. I gave him Pete Nash's name.

Mr. THOMPSON. You gave him Pete Nash's name. I think the record ought to show that. If you want to know where Pete Nash got into this picture, that is how he got into it.

The CHAIRMAN. Any other names?

Mr. THOMPSON. Mr. Truesdale told the reporter to call Pete Nash and ask him. If that is not soliciting support, I do not know what it is. You did not tell him to call me.

The CHAIRMAN. The way it was explained it was the most logical flow or reply that I can imagine. Why are they opposing you? I do not know. Call them.

Mr. THOMPSON. Well, who can we call to find out? Why do you not call Pete Nash? That is what was said. I do not know whether he gave him any other names or not. I would like to know.

The CHAIRMAN. Were there any other names or not?

Senator HATCH. Mr. Chairman, if I could interrupt for a second, as I understand it, we have an objection to meeting after 12 today. I have a lot of questions of Mr. Thompson that I would like to ask and of these other gentlemen if they can come back. They are basically pertaining to very specific areas of labor law, and at this point we were not able to get into them this morning, and I know that all of you have a lot of pressures on you.

Here is what I would like to suggest. I think it is important for everybody to know that this is not an insignificant nomination. I have nothing personally against John Truesdale, and it is not my desire to give anybody a rough time.

But it is my desire to air what I consider to be major public policy important matters, and I do not know of anything, any nomination coming before our Senate that has more major ramifications to our society as a whole than this nomination, based upon the information that I have.

I would like to ask a lot of questions of this panel, and I would like to ask a lot of questions of Mr. Truesdale as well. It is apparent we are not going to get through today.

I do not know if you gentlemen can return, but I would like very much to be able to interrogate you. Is it possible for you to return?

Mr. THOMPSON. On behalf of myself and the Chamber, we will be glad to return at any time the committee so directs.

Senator HATCH. I will have a lot of questions to ask, and I am hopeful that we can air this matter because I think that these matters are given short shrift every time we have an appointment come up, and it is time we quit giving them short shrift. This is important.

And I have been making the point over and over and over that we are in a position where we are going to have the Board so stacked that the major delicate balance in our present labor-management relations posture, or should I say what used to be the rule, is just going to be destroyed, and that could lead to chaos in America.

This is not insignificant. This is important, and I think your testimony is important, and I want Mr. Truesdale, of course, to have every right to rebut what you have to say and answer the questions that I have got to ask him with regard to his nomination.

It is apparent we cannot continue any more today under the rules. So if I can ask you fellows to be back whenever the chairman decides to hold another hearing, I would appreciate it.

Shall we proceed Monday, Pete?

The CHAIRMAN. We were just trying to work out the schedule right now.

Mr. THOMPSON. Would you like for me to bring my pictures with me when I come back? [Laughter.]

Senator HATCH. You can bring whatever you like. It will give them time if they want to have Peter Nash testify for himself. He can. And of course, if they want Mr. Brown or anybody else for that matter to testify, they can.

There is no problem with that. I think there is bound to be disagreement on any of these nominees, but I would be very surprised if Mr. Nash is not concerned about some of the decisions that I have read.

Mr. THOMPSON. I would be appalled.

Senator HATCH. Well, so would everybody.

The CHAIRMAN. That is in the record. I did not hear that. And I hate to wait for the record. What would be appalled?

Senator HATCH. I said I would be surprised if Mr. Nash agreed with some of the decisions that I am going to raise, and he said he would be appalled if he did.

The CHAIRMAN. Well, I would be appalled if all of us, any of us would ever have any person sitting in a judicial situation who would agree with everything.

Senator HATCH. So would I, but there are certain decisions here that are a little bit different.

The CHAIRMAN. Yes; and I certainly want to get into some of them. We are now trying to work out a schedule for our return here.

Certainly, that *General Knit* decision, I think putting it in the big context and I wanted to talk about this in terms of some of your feelings about expedited elections and some of the things you said that reflect, it seems to me, on an underlying attitude that you should find a basic agreement with the decision in *General Knit.* Now, that would have to be developed.

Mr. THOMPSON. I have no basic quarrel with *General Knit.* I would like an opportunity, and it sounds like we may get an opportunity to express myself on that and some of these other subjects because I do think these are vital issues to this field and to the administration of this law which surely concerned this committee as well as those of us who practice out in the field.

The CHAIRMAN. Just to quote something you said back there, Mr. Thompson:

> It is essential that voters in union elections as well as political elections have the opportunity to become fully informed on the issues in order to make a sound and reasoned decision.
>
> In labor-management relations, this requires that both the union and the employer have an adequate opportunity to communicate in a noncoercive fashion with employees regarding the issue of union membership.

And you were putting it in terms, of course, of some of the provisions that were suggested for a change of law when you said: "The quickie election procedures of that bill back there would deny the employer that opportunity."

Mr. THOMPSON. That sounds like one of my stump speeches, but I agree with everything you just said. Was that me you were quoting?

The CHAIRMAN. Now, if we put that in the context of *General Knit,* I think you and Mr. Truesdale have an underlying and philosophical area of agreement.

Mr. THOMPSON. In that one regard, we do, indeed, and I would be glad to elaborate on it if we had the time.

The CHAIRMAN. The hearing is closed. [Laughter.]

Mr. THOMPSON. It is a shame we do not have unlimited debate in these hearings.

Senator HATCH. Pete, I do have some problems with next Monday.

The CHAIRMAN. Both of us do. We are going to have to have night sessions I am afraid.

Senator HATCH. That is fine with me, but can we agree together on when we have these extra hearings, because I do have some commitments that I just have to meet, as I am sure you do likewise. But I sure want to be here, and I think it is important that this matter be aired fully.

The CHAIRMAN. Let me ask you about Monday morning. If I cancel something of importance to be here Monday morning, how would that be?

Senator HATCH. Monday morning would be fine with me. Beyond that, I cannot be here.

I might be able to be here Tuesday.

The CHAIRMAN. Tuesday is even more difficult for me. We have, in another committee I am on, the Rules Committee, the sunset legislation.

Senator HATCH. Let me put it this way. I would prefer not to meet on Monday. Tuesday is a bad day, well, the rest of the week is a bad day for me.

The CHAIRMAN. How about this, if we could work it out, to not have an objection to meeting later Monday?

Senator HATCH. My problem is I did not object today, and I do not know if that can be worked out.

The CHAIRMAN. All right. Let us try to see if we could work it out for later Monday or on the same basis later Tuesday?

Senator HATCH. Let me see what we can do. If we cannot, let us do it at the earliest possible convenience after Labor Day. I will be here and I do not see any real conflicts.

The CHAIRMAN. You know a day that is wide open is next Thursday.

Senator HATCH. I know. I cannot be here.

The CHAIRMAN. Friday, a week from today, wide open.

Senator HATCH. As you know, I will be leading a delegation to Japan for the commemoration of our 20-year mutual defense pact.

The CHAIRMAN. And I am supposed to be leading a delegation to East Berlin and I am staying here.

Senator HATCH. Oh, dear. Well, I will be happy to consider that but I do not think I can under the circumstances.

The CHAIRMAN. Well, this is, of course, an inconvenience to those who want to participate in the hearings. What we are going to have to do is see if we can work our best opportunities and then immediately be in touch with you.

Mr. THOMPSON. We will be at your disposal.

Senator HATCH. Could I ask you this, Mr. Chairman, if others do want to testify on either side of this issue, and I presume they may, I presume it would be possible or am I incorrect in that assumption, presumption?

The CHAIRMAN. Well, again within the practical difficulties of time and objections. That is our problem. Without objections to meeting during Senate sessions, why, this could be quite easy.

Senator HATCH. I cannot guarantee that. All I can say is I will ask the people to not object.

The CHAIRMAN. Fair enough. You are a leader. I am not suggesting the others are necessarily followers. [Laughter.]

We will be in touch.

[Whereupon, at 12:12 p.m., the committee adjourned at the call of the Chair.]

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NOMINATION

FRIDAY, SEPTEMBER 5, 1980

U.S. Senate,
Committee on Labor and Human Resources,
Washington, D.C.

The committee met, pursuant to notice, at 8:12 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman) presiding.

Present: Senators Williams and Hatch.

The **Chairman**. We will come to order.

Today we resume our hearing on the renomination of John Truesdale. It is my hope that we will take this opportunity to closely examine the substance of Mr. Truesdale's record, including the reasoning behind his opinions and the facts he was responding to. In my judgment, we should avoid evaluating him on the basis of a head count of cases in which he was allegedly prolabor or probusiness, and instead go deeply into his actual performance.

The dangers of considering a Board member's record solely on the basis of some sort of statistical analysis were brought home to me in a letter I received from Joseph Barbash, a well respected management attorney, who wrote:

> As former Chairman of the Administrative Law Section of the American Bar Association (although I cannot speak for that section or for the American Bar Association) I am deeply concerned about any tendency to make reappointment of an agency member turn solely on how the member voted.
>
> The policy judgments made by agency members are important, of course, and should not be ignored when reappointment is considered, but I would urge great circumspection before computer-type vote-counting is pursued. This care is particularly desirable in this case, a rare instance of a person who has served in an agency extremely well, has become one of the heads of the agency for a short period and now has been reappointed.

That was the end of the quotation from Mr. Barbash.

I think the record will show that John Truesdale's handling of cases evidences exemplary concern for the rights of both management and labor, and especially for the rights of employees. We spent a great deal of time at our last hearing discussing the Board's record in Federal court. While this Board has not done as well as it did earlier in the 1970's, its record is above average and compares very favorably with many other boards, including the Republican Board of the late 1950's and early 1960's.

It is my hope that we will now move on to a more substantive examination of the logic and concerns reflected in John Truesdale's opinions. The real question for us is not whether Truesdale was able to maintain perfect consistency with the rulings of 11 different circuit courts. Instead, I think we should be concerned with whether he was able to maintain a consistently high level of reasoning.

In this regard, I have every confidence that John Truesdale's record will be unassailable.

Orrin, we have received the statements from the panel before us, and we were in the question period. We will pick up there.

Senator HATCH. Mr. Chairman, if I could just make a short statement before we do, I would appreciate it.

The CHAIRMAN. Certainly.

Senator HATCH. Mr. Chairman, I, for one, agree with your statement that judges' opinions should ordinarily be the basis of determining whether or not they should be reappointed, and that is because most judges decide cases on a wide variety of matters and no judge is going to decide cases that will be pleasing to everybody.

In the case of the National Labor Relations Board, however, they are quasi-judges, in my opinion, who decide cases in a very narrow, limited area of the law; it happens to be labor law. One of the major objections to Mr. Truesdale and, I might add, others presently sitting on the Board is not that they have decided cases, but that they have been making major policy decisions in these cases contrary to the wishes of the Congress, and that they have been doing so with a bias that literally is detrimental to the mandate that they received when they received their original confirmation by the U. S. Senate, and that that bias could, if it goes unchecked and unattended on a stacked Board, lead to labor-management chaos in this country.

I, for one, do not want to see the Board without members who will not give due consideration to the needs of labor, but likewise I do not want to see the Board without members who will not give due consideration in every case to the interests of management, and I do not want to see the Board stacked; I think there has to be a balance on the Board.

So, really, part of the issue here is, is the National Labor Relations Board functioning as the Congress really wanted it to function—that is, in an unbiased, unprejudicial, balanced, reasonable, fair, and equitable way for the benefit of both management and labor—or is it acting and having a greater propensity to act for only one side or the other?

I do not know anybody in this field who would want a Board that would decide the vast majority of its cases in favor of management, and especially in favor of management when the U. S. Congress has rejected certain approaches that the Board is now enacting. On the other side of that coin, I do not know anybody who would want the Board to be acting 100 percent, or even in a vast majority of cases, in favor of labor. But there are some who would contend that the recent decisions of the Board have not only been biased and slanted toward one side of the labor-management equation, but that they have been setting policy decisions in matters and making cases of first impression and new impression out of ordinarily routine labor law cases, and to the detriment of the confidence of many, many people in this country in the Board.

If this continues unchecked without some consideration being given by Congress—and, unfortunately, the best consideration time we have happens to be in the confirmation process—then we will ultimately see the Board destroyed and the effectiveness of the Board, if not destroyed, certainly diluted to the point where we could, in fact, have either labor-management chaos in this country or such a state of events that nobody will have confidence in the Board.

Now, the members of the Board are not Federal judges. They do not sit in the wide variety of cases that Federal judges do. Some Federal judges are, for instance, for abortion; some are against abortion. That irritates a number of my colleagues in the Senate. But I happen to believe that some of those who are for abortion are for many other things that please certain colleagues in the Senate. So, that is one matter. The Board is not like that. The Board is deciding very, very important issues for the future of this country with regard to labor-management relations.

I think we have to give every consideration to the only opportunity that we have to keep a balance on the Board, and that is—or I should say the principal opportunity with this Congress, and that is the confirmation process, when some of these Board members come up for reconfirmation or come up for confirmation.

So, that is, I think, part of the consideration that must be made in this matter, and as much as I personally like John Truesdale, I think that we have to go into these matters in order to keep the NLRB acting as a neutral buffer between labor and management. It may be unpleasant or unfortunate, but it is one of the few opportunities that we in the Congress have for oversight, and that is what we are going to do during this confirmation process and, I presume, if this nomination is brought to the floor, during the process on the floor.

That is all I have to say at the outset this morning.

The CHAIRMAN. All right. Thank you very much, Senator Hatch. I have some confusion in following your logic and the explanation of it. You call for balance. I gather a balance between what you would describe as a labor orientation and a management orientation. You call for a neutral buffer.

Quite frankly, it seems to me that, obviously, we are to consider and to advise and consent; we do not appoint. But if I were the appointing agency, I would not look necessarily to bring people from labor or from management for this Board. I would feel very fortunate, if I were the appointing officer, to find somebody that was not of either, but had an incisive mind and clear reason to apply to the decisions before the Board upon which he serves.

This business of choosing people for these positions, judicial or quasi-judicial, because of some predilection on a particular area of the responsibility in the office—your campaign, your campaign document, the platform—I think you have slipped into this, have you not, Orrin? Do you not call for judges who have indicated a certain attitude about some part of the responsibility that might come before the judiciary for a decision? How does that plank read?

Senator HATCH. Well, be that as it may, this is not a judgeship situation. Let me say this——

The CHAIRMAN. Well, you were talking abortion. Abortion is not a question before the National Labor Relations Board.

Senator HATCH. Let me answer your question. If I might say so myself, I agree with you in what you have said, but this is not a matter of predilection here. We have a number of cases that we can look at to show a predisposition to decide for one side or the other.

The Chairman. Now, let us analyze John Truesdale's decisions in that light.

Predisposition, did you say, or predilection?

Senator Hatch. Well, I do not know how you would call it. You say they should not have a predilection. I think we have now a whole set of cases that will determine whether or not, it seems to me, Mr. Truesdale has basically been setting policy here rather than upholding the law; second, whether the NLRB, as presently constituted, even has the semblance of the neutral buffer which I have spoken about.

I am happy to hear you say that if you were picking these people, you would try to get good, competent people who—you would not care which way they felt, as long as they would be competent and neutral and do a very fair and equitable and ethical job. Unfortunately, I have not found that same propensity in the President of the United States in the appointments that he has made, and I think there are a lot of others who question the propensities of the President of the United States. I think he has not given very much consideration to your, I think, very interesting and good statement here.

The Chairman. We will be discussing this whole attitude more.

Senator Hatch. I suspect there will be a lot of discussion on this here as well as on the floor.

The Chairman. We must always keep in mind the mandate of section 7 of the Labor-Management Relations Act. This is the law, and it is to protect the interests of employees.

Senator Hatch. But you do not protect the interests of employees by nailing the hides of the employers to the wall everytime you turn around, and I think that is what is happening here. If that continues to happen, you are going to find employers starting to rear on their haunches and say, "We have had it; we are not going to put up with this anymore."

I think that is what happened on labor law reform. That is what is happening on this nomination. There is excitement all over this country about this nomination.

The Chairman. The law does not talk about the interests of management or labor organizations.

Senator Hatch. Everybody understands that.

The Chairman. The bottom line is, they say, the interests of the employees now.

But let us turn to the cases here. Let us look at the *Florida Steel* case. I would like to discuss with Mr. Coleman for a moment the notion—your notion, Mr. Coleman, if the Board in that case has attempted to implement the equal access provisions of labor law reform.

First, I would like to remind you that the provisions in that bill granted equal access to the union whenever the employer chose to address his employees on the question of union representation during the course of an election campaign. By contrast, the Board has allowed the union this sort of right only in rare cases where it is one of the only means of remedying the coercive atmosphere caused by serious, aggravated, and recidivist employer conduct.

You are quite right in inferring that the so-called equal access provisions of labor law reform are rooted in the Board's use of the remedy in these very extreme cases. What I am disturbed about, though, is your argument that because Congress considered and did not enact this remedy on the broad basis called for in labor law reform, the Board is proscribed from using it at all, even on the limited basis it has traditionally applied this remedy and for a long period—I say traditionally; it runs back 15 years at least.

It seems to me that it is illogical to claim that Congress actually contracted the Board's remedial powers by failing to pass an act designed to expand it. This sort of negative implication is particularly unwarranted in that the Senate did not actually vote on these provisions. As we all know, it merely failed to cut off extended debate; we never did get to a vote.

I think it is clear that the remedy used in *Florida Steel* is within the Board's powers. Let me ask you: Is it not the same remedy given in 1977 by the second circuit court in a contempt case involving J. P. Stevens?

STATEMENTS OF ROBERT T. THOMPSON, CHAIRMAN, LABOR RELATIONS COMMITTEE, AND REGIONAL VICE CHAIRMAN, BOARD OF DIRECTORS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, WASHINGTON, D.C., ACCOMPANIED BY G. JOHN TYSSE, DIRECTOR OF LABOR LAW, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; AND ARTHUR F. ROSENFELD, LABOR RELATIONS ATTORNEY, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; AND FRANCIS T. COLEMAN, MEMBER, LABOR RELATIONS COMMITTEE, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C., ACCOMPANIED BY GEORGE R. SALEM, ASSOCIATE ATTORNEY, THOMPSON, MANN AND HUTSON, A PANEL

Mr. COLEMAN. It may be, but I remind you, Senator, that in the *Florida Steel* case itself, that decision was overruled by the fifth circuit court of appeals, and the court observed that the Board went far beyond its remedial authority to remedy unfair labor practices and was engaged in an ongoing, continuing basis to police the premises of the employer far beyond anything that had to do with correcting the unfair labor practices that gave rise to the charge.

I think what we are seeing here is the Board bringing in a whole new remedy, which we would consider to be punitive, that has nothing to do with correcting the underlying unfair labor practice charges. If the employer had engaged in coercive activity, the remedy is to tell the employer to stop engaging in coercive activity. You do not open up a whole new area of union rights of access to an employer's private property as a means of remedying the unfair labor practice, and that is exactly what the fifth circuit court of appeals told the Board; that this was beyond the traditional authority of the Board in this area.

Although in maybe one or two isolated cases the Board has attempted to impose an equal access remedy, the general rule has been that this is an unusual, extraordinary remedy, and it had not been used with any frequency until the current Board started to

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use it on a regular basis. *Florida Steel* was one of the first cases where they did this. In two other cases, they sought to impose the same type of remedy; the *Lundy Bros.* restaurant case and the *Sambo's* restaurant case, both 1980 cases. So, the Board is attempting to impose this type of remedy as a matter of course, it seems to me.

Senator HATCH. Did Mr. Truesdale participate in all three of those cases, in the majority opinions?

Mr. COLEMAN. I believe he did; I believe he did.

The CHAIRMAN. Maybe we will have discussion from others on this point; maybe Professor Goldberg later will talk to it, too.

It seems to me in that *Florida Steel* case, as I read it, the court in no way, as you have claimed, proscribed the application of the equal access remedy. What it did was limit its use to plants where the union had bargaining rights. Was that not the application of the court's decision?

Mr. THOMPSON. That is correct, Mr. Chairman, but that is the very point of the discussion. Equal access in a plant where the union already has bargaining rights is a totally different concept than equal access in a plant during organizing activities. The part the court threw out was the part that concerns us, and we think they properly threw it out, and that is giving equal access to unions during organizing drives. That is the way I read the case.

The CHAIRMAN. There is ample decision—Board decision, court decision—that equal access is appropriately applied in situations where it has been applied. The second and fourth circuits have enforced this identical remedy.

Mr. THOMPSON. There are some cases—mainly *J. P. Stevens* cases—where the court has allowed the Board, because of the extraordinary circumstances, to invoke the equal access rule.

What we are concerned about now is that this Board, which we consider to be an extremely activist board and of which Mr. Truesdale is presently, or until last week was a member, is going down the road of applying equal access in every case where they even think they can get away with it. We do not know how far the courts will let them go. The fifth circuit did not let them go as far as they wanted in the *Florida Steel* case.

We think equal access is only a part of an overall scheme, if you will, by this Board, at the urging of the organized labor groups, to stiffle the rights of the employees, those very people that you mentioned in section 7 of the act. We do not disagree with your statement there. The act is designed to establish and protect the rights of employees. We think it is a scheme to defeat those rights, to defeat the exercise of those rights, to stiffle the employer in the exercise of the rights which he has under this law, to express himself to his employees, to inform his employees on the issue of unions and why they should or should not be represented by unions in the organizing campaign, and in the representation case arena.

This is the reason we feel so strongly about this particular nomination. It is the reason we felt so strongly about the Zimmerman nomination and the Lubbers nomination. We have not been up here through the years, as you may recall, Mr. Chairman, objecting to every nomination that has been put forth for this Board or for other regulatory agencies in the labor field. In fact, I personally, as chairman of the Labor Relations Committee of the Chamber of Commerce—and I have been chairman for a number of years—have never appeared before this committee or your counterpart in the House to oppose a nomination to the Labor Board in all the years that I have been around. Now, I have testified over 100 times on other issues, but I have never come up here and testified against a nomination, and it is not because of Mr. Truesdale personally; it is because of the alarm that we have and our members have over the trend of cases in this Board of which Mr. Truesdale is a part.

Equal access is a perfect example of what we are concerned about, and that is that this Board is attempting to do by Board decision, by edict, what this Congress refused to do in labor law reform. Now, if you call that contracting or cutting back on the law—call it what you will.

We hear reports every day that this is what they are about, and as soon as they get all the players in place, which means Mr. Truesdale, who is the last of the players they want to put into place, they are going to take off like a rocket in putting into effect labor law reform, plus, plus, plus. That is what we are seeing, and that is what you are going to see, and that is the reason their reversal record has changed dramatically in the last 12 months.

We have got a runaway board here, and we are trying to stop it. And Joe Barbash is one of the greatest men in America, but he is just flat wrong, because he does not understand what we are trying to do.

The CHAIRMAN. All you have really proven to me is you are color blind, Bob.

Mr. THOMPSON. Well, that may be. I do not quite follow you, though.

The CHAIRMAN. See that red light. You have been talking 5 minutes; you have been running a red light for 5 minutes.

Mr. THOMPSON. I thought that red light was for your questions, not for my answers. [Laughter.]

The CHAIRMAN. No; that was your answer. That last 5 minutes is on Mr. Thompson, Orrin, so I would like to pursue this.

Senator HATCH. Go ahead.

Mr. THOMPSON. I think you should publish the rules on these lights.

The CHAIRMAN. As a matter of fact, you were not even addressed on this question; it was Mr. Coleman. You were a thief of time. [Laughter.]

Mr. THOMPSON. In our usual bandying around here, we have been coupled together, and you will have to just accept us in tandem, Mr. Chairman, since you insisted that we appear this way.

Senator HATCH. If I could ask a special favor of you, Mr. Chairman, during the interrogation by either of us, or whoever comes on the committee, would it be possible, without always asking for leave to interfere, to just kind of jut in with questions and comments on both of our parts? I would be happy if you did that during my questioning. I do not intend to do much of it, but if I do have some things that come up at the time, I would rather get it out now than have to make a big list. Is that OK with you? I will try not to abuse it.

The CHAIRMAN. I think that probably could advance the purpose of the hearing.

Senator HATCH. I think so, as long as you understand that I am not trying to interrupt you.

The CHAIRMAN. Good. Let me come back to a little more detail on Florida Steel, if I could.

My understanding is that Florida Steel, the company itself, has a history of labor law violations that is exceptional. Others who have studied this more closely than I tell me that very few employers have a record of violations that surpass Florida Steel.

The case that you gentlemen seem to be upset about, as a matter of fact, is the 17th Board case in which this particular company, Florida Steel, has been found to have violated the act in a relatively short period of time, 6 years. Some of these cases, we have reviewed, and the picture they present is certainly not a favorable one to Florida Steel. There have been findings of a number of discharges, threats, other coercive activity. One time, they even decreased benefits at a unionized plant and raised them at nonunionized plants. They then used this action as an example to nonunionized employees of the cost of exercising their section 7 rights. They did the same thing when they gave merit pay raises to everyone except employees who were organizing.

In this latest case, the Board found that the cumulative effect of Florida Steel's conduct was to chill legitimate organizational efforts on a companywide basis and, therefore, gave the union the opportunity to communicate with employees on company time as a means of dissipating the coercive atmosphere at that company.

Now, the courts have enforced or partially enforced Board remedies in Florida Steel cases. In all but two cases, they have normally agreed with the Board's factfindings, and the present Florida Steel case is no exception. In fact, all Board members concurred in the finding that Florida Steel had committed unfair labor practices in this case and many others.

Mr. Coleman, I presume you disapprove of such conduct on the part of a corporation, as does the organization you speak for, NAM.

Mr. COLEMAN. I think that is correct, but I do not think that is the real issue that is involved in Florida Steel.

All of the so-called derelictions or unfair labor practices that you mentioned, all of them have legitimate Board remedies that have been approved by the courts over the years. Where you have an illegal discharge, there is reinstatement and back pay. Where you have denial of merit increases, there is an order to apply those merit increases.

What we are complaining about here is imposing what the fifth circuit found to be a punitive remedy that did not have anything to do with remedying the unfair labor practices that were found and, I might point out, were in some cases upheld by the Board. Merely reciting the number of unfair labor practice findings and saying there is a numerical quantum that should trigger an equal access remedy, I do not think that that is a fair way to assess these cases.

There are many, many violations of the National Labor Relations Act which are technical in nature, and they have changed depending on which board is assessing the conduct involved. You talk about the merit increase situation. This is another one of those cases where an employer is damned if he does and damned if he does not. If he gives the merit increase, then the Board says that he is trying to influence or bribe the employees into voting for the company. If he denies it, then he is coercing them. So, it is one of these no-win situations for an employer. Do you give a merit increase during a union organizing drive, or do you not? You run the risk of being hit with an unfair labor practice charge either way.

So, my point is that there are traditional Board remedies that have been accepted and approved by the courts over the years to remedy the type of unfair labor practices that you have referred to.

Senator HATCH. Do those remedies work?

Mr. COLEMAN. They work. They may not work to the total satisfaction of the union involved, in the sense that they may not always lead to a bargaining order or the union winning an election.

The CHAIRMAN. They work if you have a long life and a lot of money.

Senator HATCH. Could I interrupt for a second, Mr. Chairman? The reason they work is because there is a contempt provision also, and the contempt citations can be brought, right?

Mr. COLEMAN. That is quite correct.

Senator HATCH. How many contempt cases are there a year?

Mr. THOMPSON. A handful.

Senator HATCH. About 25, are there not, at the most?

Mr. THOMPSON. Right.

Senator HATCH. Now, what does that indicate to you?

Mr. COLEMAN. It indicates that the Board is not using the authority that it has in this area.

Senator HATCH. Or, it indicates that some of the complained of situations are not as serious as they are complained of, or they would be asking for contempt.

Mr. THOMPSON. It indicates to me, Senator, if I may poach on the question again, that most employers are law-abiding citizens and they are not brought before this Board. If you look at the potential for——

Senator HATCH. Do you mean you are telling me that most employers are law-abiding citizens? Why, I have heard a lot of implications that maybe because of one or two or even six isolated employers in this country, that all employers have to be tainted.

Mr. THOMPSON. Well, if you listen to the distinguished chairman of your committee, you would think that all employers were guilty of high crimes and misdemeanors in all labor situations because they are employers. We contend that all——

The CHAIRMAN. Wait a minute now. What are you talking about? Are you talking about me?

Mr. THOMPSON. Yes, sir. I think your questions——

The CHAIRMAN. I said this is rare, indeed.

Mr. THOMPSON. Your questions through the years have indicated to me, at least, that you have this feeling that all employers, given an opportunity, will violate the law.

The CHAIRMAN. No, no, no.

Mr. THOMPSON. I contend that most employers, practically all employers, are law-abiding citizens. They never even come before this Labor Board or the courts under the unfair labor practice provisions of the law. More often, they come before the Board in the election or the representation cases.

The CHAIRMAN. I am going to later on just explain how happy I am with the high, high percentage of situations that produce disagreement, conflict cases that never, never get reported as Board decisions because of the high level of settlements, and that is the way we like to go.

Mr. THOMPSON. If you recall, I addressed that subject the last time we were here.

The CHAIRMAN. Yes, I sure do.

Mr. THOMPSON. We all applaud that. I am concerned that that percentage is going the same route as the affirmance or the reversals.

The CHAIRMAN. What percentage do you think they had this past year?

Mr. THOMPSON. I am not right on the money, but I would say it is probably 93, 94 percent.

The CHAIRMAN. You are pretty close.

Mr. THOMPSON. Well, I have studied these figures through the years, Mr. Chairman, because that is the business I am in. But I do have a concern, and I think you should have a concern, that that percentage is going down as this Board goes further and further toward the prounion slant that it is now following, because more and more employers are going to stand up for their rights, and that is going to mean you will have more litigation; you will have more controversy in the labor-management field, which is exactly the opposite result of what you are seeking in this legislation.

The CHAIRMAN. Which legislation?

Mr. THOMPSON. The legislation or act that this Board is set up to administer.

The CHAIRMAN. Yes.

Mr. THOMPSON. You are going to have more controversy under this law with this kind of an aggressive, activist Board that Mr. Fanning is directing and is about to throw into high gear as soon as he gets Mr. Truesdale or somebody like him on board.

You are going to have more controversy; you are going to have fewer settlements. That percentage of, say, 93 percent is going down to 83 percent, which means your case load will triple. You will not have enough Board members; you will not have enough labor lawyers in the United States to handle all the cases.

That is what they are doing, and they are doing it under the guise of trying to protect the rights of employees. They are not protecting rights of employees; they are promoting unionism, and I know it and you know it. I did not see the light, but I stopped anyway.

The CHAIRMAN. We will get into a few more cases here. I am glad we came in at 8; we are going to have a long day here.

Mr. THOMPSON. Well, I just assumed that you came in early because you wanted us to really sound off, so we are sounding off. It is a wonderful opportunity, I might say, and I appreciate it.

The **Chairman**. You have got your buckshot out; now let us go to the rifles on some of these.

Let me now turn to you, Orrin.

Senator **Hatch**. If you would like, Mr. Chairman, I will be glad to wait for you.

The **Chairman**. We will recharge. Did anybody watch Midway last night?

Senator **Hatch**. I did not have time; I was busy preparing for this hearing.

Mr. **Thompson**. I was studying labor law. [Laughter.]

The **Chairman**. I have to load up my planes for another strike. [Laughter.]

Senator **Hatch**. I understand that concept; I did catch the tail end of it.

It is my understanding that there are somewhat less than 25 contempt citations a year. That is pretty much in the ball park, is it not?

Mr. **Thompson**. That is correct.

Senator **Hatch**. It is also my understanding that the unions are not loathe to bring contempt citations if they feel they are justified.

Mr. **Thompson**. My own experience, Senator, is that, of course, the unions quite often request that the general counsel bring a contempt citation.

Senator **Hatch**. Quite often.

Mr. **Thompson**. My own experience is that the Board itself is reluctant to bring contempt citations. I have never quite understood what their guiding principles are, because they do not seem to publish them or they do not seem to follow a clear pattern. You certainly do not see many contempt cases. There are probably more now than in a long time.

Senator **Hatch**. But the point I am making is that if these cases are so grievous, then there is a procedure provided; if the unions want to go beyond the actual remedy provided in present law, they can go on and ask that that be issued.

Mr. **Thompson**. Well, they certainly can; the law is there for contempt procedures. It seems to me that there is a more basic element here that ought to be brought out, and that is that the Congress, in all of its wisdom, put into place a law that has been amended in major form twice which has remedies in it, and those are the remedies available to the Labor Board.

It is well established that none of those remedies are supposed to be punitive, and everytime the Board attempts to make one of them punitive, the courts slap them down.

Senator **Hatch**. The Senate slapped down labor law reform which also attempted to make punitive remedies the law.

Mr. **Thompson**. Yes, sir, that is correct.

The **Chairman**. Slap down labor law?

Senator **Hatch**. Well, that is what union leaders have said.

The **Chairman**. You did not give yourself a chance to slap it down.

Mr. **Thompson**. I was talking about the courts slapping down the Board. If you would read some of these recent opinions of courts of appeals, you would have to characterize them as slapping this Board down on some of the things it is trying to do.

I only hope the courts will continue, because the percentage rate of reversals is going up.

Senator HATCH. Let me just interrupt you on that point. With 240 new Federal judgeships appointed by this administration, which has a propensity to appoint very interesting people not only to the bench but to the National Labor Relations Board, the court system may very well not continue to uphold the law that the present labor laws should not be punitive.

The CHAIRMAN. I will say that I think those that just came onto the bench recently within the State of New Jersey have no bias in relation to labor-management affairs. We look not to predilection and what they would do in imagined situations; we look to their record as individuals—creditable, wise, and judicious in their approaches.

Have no fear from New Jersey, I will tell you; we have five new judges up there.

Senator HATCH. Well, I am glad to see that the chairman discusses these matters with the Federal judges before they are approved. I happen to sit on the Judiciary Committee and I have seen the type of Federal judges that are approved.

The CHAIRMAN. I am just saying I did not discuss abortion or anything else with them. I looked at their record of sound, solid, thoughtful, incisive reasoning.

Mr. THOMPSON. I gainsay that the chairman handpicked those five gentlemen himself.

The CHAIRMAN. No. As a matter of fact, I went through an elaborate committee apparatus. I do not think I would do it again, but——

[Laughter.]

Mr. THOMPSON. May I say, Mr. Chairman, that I had the pleasure of driving the length of your State in an automobile this week.

The CHAIRMAN. Well, I wish you would sometime take the width; you will find the more beautiful parts of our State.

Mr. THOMPSON. Well, I crossed it in a rather diagonal way, so I saw the length and breadth of it. It is a beautiful State.

The CHAIRMAN. Well, if you get up to Mill Road up in Somerset County, there you will see beauty.

Mr. THOMPSON. You have a beautiful State and you have some wonderful people in New Jersey.

The CHAIRMAN. Name one. [Laughter.]

That is in-house; Mr. Thompson and I have a common friend who is truly a great, great human being, Dr. Cardin.

Mr. THOMPSON. He happens to be a doctor of medicine; he is a wonderful man, Dr. Cardin. He is a neighbor of the Senator's as well.

I would like to say this, though. I think that your experience in New Jersey in terms of labor relations is rather unusual or different than the rest of the country. You just do not simply have the same situation we have in other places.

The CHAIRMAN. Well, maybe there ought to be a little amplification there.

Mr. THOMPSON. Well, you seem to have a situation there where the unions pretty well control the politics of your state, and therefore I think you have a little bit of a distorted picture. The rest of us, for better or worse, live under different circumstances, so I wish you would take that into account when you look at some of these issues that we discuss.

There are more basic things here, I think, on the remedy question than whether we have contempt citations—that is the point I wanted to make—and that is that you, in your wisdom, put into place a law which has remedies available to this Board. These remedies, for better or worse, are there for them to use.

Now, what we keep seeing and what we keep expressing concern and alarm over is that this Board and the unions for whom they seem to be carrying water these days are not satisfied with the remedies that you put into this law, and so they keep dreaming up extraordinary situations and extraordinary remedies, and they keep walking into the punitive area because they just absolutely cannot stand the fact that the number of victories in union representation elections keeps going down, and they are looking for ways to reverse that statistic.

I think you have to view all of these things in that light. That is what this is really all about. I think that is where you get equal access; they are trying to stifle the employer so he will not be able to inform and enlighten his employees so that they will go in blind and vote unions in. That is what you see in all of these things. If you will look at all of them in that light, you will see what we are concerned about.

Mr. Truesdale just happens to be the person who comes up for reappointment at a time when we have reached the outer limits of this kind of conduct.

Senator HATCH. Mr. Thompson, this happens to be the 5th year in a row where the unions have lost more unionizing elections than they have won, is that not correct?

Mr. THOMPSON. That is correct.

Senator HATCH. And they are concerned about that, as you would expect them to be.

Mr. THOMPSON. Even the New York Times is concerned. I cut an article out of the Labor Day issue of the New York Times, "For and Against Unions," and they suggest seriously whether organized labor will continue to be a viable force in our society at the rate they are going. I think that is a part of what we are seeing here.

The unions are making an effort, with the full support of the National Labor Relations Board, to turn these statistics around and increase themselves and their power through means that are not in this law, and that is our concern.

Senator HATCH. Mr. Chairman, if I could just make a couple of more points—I notice that the red light is on—and then I will relinquish to you, if it is all right with you.

One of the problems you have brought up here, Mr. Thompson, happens to be that the business community is concerned because not only have the triumverate of Fanning, Jenkins and Truesdale been rendering these decisions, which in this limited discussion so far this morning have centered on the use of punitive remedies when they have plenty of regular remedies within the Board's purview, and also the ability to get contempt which is rarely obtained, but the fact that Mr. Lubbers was appointed to the "independent" General Counsel's position after having worked with or under Mr. Fanning for 21 plus years.

Now, Mr. Zimmerman is on the Board, who the business community, I think it is fair to say, believes will go along with the triumverate of the three, making four to one. Mr. Penello, as I understand it, is a Democratic appointment, but the business community feels he gives them some consideration in these decision-making processes.

Am I correct that you feel that if Mr. Truesdale's nomination is confirmed, there will be a slanted control of the Board four to one against business and in favor of unions?

Mr. THOMPSON. That is the concern that we have.

Senator HATCH. Plus the control of the General Counsel's position, which may be more important than being on the Board because he issues the opinion; he determines which cases are brought and which cases are not brought and which cases are delayed, and his opinions are basically unappealable. Is that correct, also?

Mr. THOMPSON. That is correct.

Senator HATCH. Is it not also correct that one of your concerns is that the Board generally meets in panels, is that right?

Mr. THOMPSON. That is correct.

Senator HATCH. And, generally, those panels are panels of three, is that correct?

Mr. THOMPSON. Yes, sir.

Senator HATCH. And if it is four to one against the business point of view, then that means that every panel henceforth could be stacked against business, even though there might be one who would give some consideration to business' fair and legitimate objectives?

Mr. THOMPSON. That is correct, sir.

Senator HATCH. So the business community, I take it, is terrified that if this continues, the business community will be seriously hurt and the free enterprise system hurt and, in the end, the Board itself. Am I correct on that?

Mr. THOMPSON. Yes, sir; but I would take it one step further, and I think it goes back to what the chairman said at the beginning of this hearing, and that is that we have a concern for the rights of our employees just as the unions presumably do and just as this committee does.

This law was put into place for the benefit of working people, employees.

Senator HATCH. Will they not be the ultimate people hurt?

Mr. THOMPSON. They will be the ultimate people hurt, because they will, in many instances, have unions forced upon them. They will, in other instances, find themselves represented by unions that they knew nothing about beforehand because their employer was stymied and forced to remain silent during the campaign period.

They will be in situations where unions are certified to represent them, when not even a majority of them have voted in favor of the union. There is a line of cases developing that we are terribly concerned about, following on the Gissel theory that the Supreme Court set down which allows the Board, we think unwisely, to certify unions to represent employees, despite the fact that the employees voted against the union in a representation election, because of unfair labor practices that take place along the way.

We think that remedy, for example, is wrong because, in effect, it is forcing the union on employees who have, in a secret ballot election, said they do not want it, in order to punish the employer for his unfair labor practices. This is a kind of ridiculous result, we think.

But if you take the next step, which this Board is about ready to take, and go to the point where the union never even had a majority of the cards signed among the employees and allow this Board to certify a union to represent those employees who never under any circumstances indicated a majority interest in the union, you are going to impose unions on unwilling or unwitting employees because of unfair labor practices by employers.

We think that is just absurd; we think that is directly contrary to the basic objectives of this act.

Senator HATCH. And that is without the benefit of secret ballot elections so that they would be known if they voted against the union.

Mr. THOMPSON. That is correct, but it is also without the benefit of even a majority of the employees having signed these cards, and everybody knows it is about the easiest thing in the world to get people to sign cards.

Senator HATCH. Why can we not have secret ballot elections?

Mr. THOMPSON. Well, the Board is developing a line of cases in which it would avoid the secret ballot election where there is unfair labor practice activity on the part of the employer.

Unfortunately, when the courts have allowed this in the majority of card-signing cases where there are unfair labor practices, the result is that employees are represented by a union that they have not selected and they have had no real opportunity to select.

Senator HATCH. And may not want.

Mr. THOMPSON. They probably do not want it. In most of the cases, they have rejected it in a secret ballot election, and they get the union anyway because that is the way the Board sees fit to punish the employer for his wrongdoing—a totally incongruous result.

Senator HATCH. They have rejected them in the majority of the cases in the last 5 years?

Mr. THOMPSON. That is right.

Senator HATCH. And these have been fairly conducted elections, in your opinion?

Mr. THOMPSON. Well, according to what I read in the cases, the conduct of the elections themselves has been established as being fair.

Senator HATCH. In fact, the law provides for stringent protections to the employees and the unions in the conduct of the elections.

Mr. THOMPSON. And experience tells us that in practically every instance, the actual conduct of the election is fair and untrammeled as far as any kind of interference is concerned.

But I think the point that has to be the foundation of all of this is the employee and his rights to either be represented by unions or not be represented by unions.

Senator HATCH. Well, just on that particular point, calling your attention to the Board's most recent decision, which is *General Dynamics* v. *IUE*, do you feel that the decision exemplifies the Board's unreasonable paternalistic approach to employee rights? You might want to tell us about the case, Mr. Coleman.

Mr. COLEMAN. Yes, let me jump into that.

Senator HATCH. Then I will yield, Mr. Chairman.

Mr. COLEMAN. Senator, that is the type of thing that we in the management community who represent management clients are concerned about. In that case, and I think it is a July case where Mr. Truesdale was on the majority, the election was overturned because of a poster that the company had displayed.

Senator HATCH. Let me interrupt you, Mr. Coleman. IUE's track record with regard to General Dynamics was basically poor, is that not correct?

Mr. COLEMAN. That is right; they had lost elections at the company, I think, and won 3.

Senator HATCH. Right.

Mr. COLEMAN. The company, in the poster, said "Do not vote for a loser." Any normal person, in my estimation, would say that that references "do not vote for a union where your fellow employees have voted against it on many previous occasions."

Instead of taking that interpretation, which was the logical, reasonable interpretation, the Board came up with some presumed interpretation that this "loser" reference was to two plants that the company had closed subsequent to their being organized, and developed some obtuse line of reasoning that the company was implicitly indicating to the employees that if they voted for the company or against the union, the company would somehow close the plant, even though the company had directly disclaimed any intention to close the plant if the employees decided to exercise their right and vote for the union.

So the Board found that this was an unfair labor practice to have this poster there that referred to the union as a loser.

The second aspect of the case was that several company officials wrote letters and made speeches and told about the possible consequences of unionization—the fact that this could lead to strikes and it could lead to problems down the road, all of which were fair and accurate statements and all of which contained disclaimers—the fact that the company was not suggesting that any of these consequences were inevitable, but that they were things that had happened in the past at other companies that had been unionized and that they were considerations that the employees should have before them when they went in to cast their votes.

Senator HATCH. Would you not say that that case had a chilling effect on employers' rights to speak out themselves about the unionizing attempt?

Mr. COLEMAN. Well, it certainly did, and it chilled the whole result of the election. The employees had voted against union representation, and the Board in its presumed wisdom deemed that the fact that they voted against the union was because of some implied coercion on the employer's part, and set aside the entire election.

Senator **Hatch**. And you are saying that all the coercion was that after 11 elections were lost by the unions, 3 were won, and there were 2 strikes and 2 plant closings, they had a poster that said "Do not vote for a loser?"

Mr. **Coleman**. That is correct.

Senator **Hatch**. That was all they could show?

Mr. **Coleman**. That is right.

Senator **Hatch**. The Board chose those five words, "Do not vote for a loser."

Mr. **Coleman**. They singled them out and somehow tried to interpret the "loser" reference to a plant closing, which was a complete non sequitur, instead of saying that the "loser" reference referred to the fact of the matter that the union had lost 11 elections and only won 3.

Senator **Hatch**. Thank you, Mr. Chairman.

The **Chairman**. Now, what panel decided that case?

Mr. **Coleman**. Well, there was Mr. Truesdale, Mr. Jenkins, and Mr. Penello.

The **Chairman**. Does it upset you that Mr. Penello, whom you have always felt took a fair view of things here in management and labor——

Mr. **Thompson**. It illustrates that Mr. Penello is a fairminded judge who does not always come down on our side.

The **Chairman**. Is that not exactly what I have been trying to develop, and perhaps not to your express satisfaction? That is what we should be looking for, the fairminded man with ability.

Mr. **Thompson**. Well, we have not said that Mr. Truesdale's decision so far has been 100 percent the other way either. What we are saying is that the reason we are here today is because we are terribly alarmed, and our members who number millions are terribly alarmed over the trend of cases which he has participated in along with Chairman Fanning and Member Jenkins, and we anticipate that new Member Zimmerman will join right in with them; we hope he will not. He tells us he will not, we hope he will not.

In any event, that is our concern. We see a runaway Board here, and we see Mr. Truesdale as running right along with it. As soon as the confirmation comes through for him, if it does, we think he will saddle up and ride, and that is what we do not want to happen.

We want this Board to go back to a balanced Board, if you can call it that. We do not think it has ever been promanagement. When it is balanced, it is pretty bad as it is, but when it is unbalanced like it is now, it is awful. We think the people who suffer the most are the employees themselves; they get unions when they do not want unions; they get no information when they want information. They are treated like they have not got good sense by this Board.

Incidentally, they always have been treated that way. Ever since this Board was set up, it has acted like workers do not have good sense, which I think is the most ridiculous fallacy in the whole history of labor-management relations in this country.

Senator **Hatch**. Or that they need protection.

Mr. **Thompson**. Well, they need protection from their own government, but they do not need protection from their own employers, as this Board views it; I think that is the point.

Senator **Hatch**. Well, they need protection that the act provides; the act provides a lot of protection for them, so they do not need to be treated like they do not have minds of their own.

Mr. **Thompson**. That is correct, sir. We discussed in our earlier hearing a point that I hope we will get into today, and that is the Board's attitude toward campaign tactics and propagandizing on both sides.

There was a short interval when the Board seemed to be entering the 20th century and it kind of opened up the campaign limits for both sides, and then Mr. Truesdale and his people came along and restricted it back, because they do not want these people to hear both sides.

Senator **Hatch**. Is it not true that the only way that the company in this case, General Dynamics, has of really getting a fair hearing on that type of decision is to have it be declared an unfair labor practice so that they can then appeal to the courts?

Mr. **Coleman**. That is right, Senator. Assuming there is a second election and assuming at the second election that the union were to win, then the company, in order to really contest whether the Board had ruled properly with respect to the first election, would be required to refuse to bargain. The Board would issue a complaint; the Board would rubberstamp its previous findings, and then the company would finally get a determination on that first election through the court of appeals.

Senator **Hatch**. Let us assume the company loses; then where is the company?

Mr. **Coleman**. Loses at the court of appeals level?

Senator **Hatch**. No; the election.

Mr. **Coleman**. The rerun election?

Senator **Hatch**. Yes.

Mr. **Coleman**. Well, as I say, at that point the only way that they could contest the first election is to refuse to bargain on the basis that the first election was a valid election and should never have been thrown out. To do that, they would have to go through the whole NLRB complaint process—a hearing and then a decision by the Board in Washington—and then take that decision up to a court of appeals.

Senator **Hatch**. Well, how long would that take? Are not the employees shortchanged if the courts finally uphold the company?

Mr. **Coleman**. That would probably take anywhere from 2 to 3 years.

Senator **Hatch**. What happens to the employees during that time?

Mr. **Coleman**. Well, they are out in the cold; they are in a limbo state, because the company is not going to bargain with the union during that whole 2- to 3-year period because the company's position is that the employees, in a fair election the first time, rejected the union.

As a result, the employees are the ones that are left in the middle in this limbo period for the whole 2- to 3-year period of the appeal.

This *General Dynamics* case, I think, typifies the Board's paternalistic approach to policing campaign conduct. They have a great expertise, or seemingly think they have a great expertise for getting inside employees' minds and determining, through all sorts of presumptions, what factors influenced employees and which did not.

The Board has a great deal of leeway here in setting aside elections where employees do not want anything to do with unions and have so stated by their vote in the secret ballot election process.

The CHAIRMAN. Did I sense a lament here in the long period of the appellate process, a 2- to 3-year delay in getting a decision? Was that part of your last statement, a lament that it takes so long?

Mr. COLEMAN. Well, yes, there is a lament in this situation where an employer has to wait so long to get this thing resolved, and the employees are caught in the middle for this long period of time.

The CHAIRMAN. Well, that is something that we might chew on around here at some legislative time. There might be ways to get an earlier decision; how about self-enforcing orders?

Mr. COLEMAN. Well, even aside from that, one of the problems of the delay is that the Board is outreaching and getting involved in so many of these cases in policing these aspects of elections that their caseload is increasing tremendously, as we have all heard. That is one of the things that is slowing down the resolution of these types of management-labor disputes.

I think Senator Hatch pointed out last time that the Board has reached out and become involved in the jurisdiction over small employers that have no impact whatsoever on interstate commerce, but yet the Board is sticking its nose into their labor relations and using their resources and time to decide those cases. All of these factors add to the delay on the Board's part.

In many cases now, if a hearing notice is issued from a regional office, it is 4 to 5 to 6 months between the time that the NLRB issues a complaint and the time you have a hearing before an administrative law judge. Then, even after you get a decision from an administrative law judge, it is going to be another 3 to 4 months before the matter gets to the NLRB for decision, to the full Board in Washington.

Of course, because of this problem that we have highlighted where management does not feel that it is getting a fair and impartial determination by the Board, more and more management officials feel compelled to take these cases to the court of appeals. Again, that is crowding their dockets and delaying ultimate decisions.

I think that is why it is so important that the NLRB representatives be reflective of a fair and even balance in their administration of the law.

The CHAIRMAN. Now, let us look at some issues that you would consider would be a good test of a fairminded, objective approach to the interpretation and application of the basic law.

How about the class to be protected under the law? The class to be protected under the law is the employees. It would seem to me that in the area of definition of the class, we might have a classic situation to test the objectivity of application of the law, where the question is, are certain personnel in the protected class or are they beyond.

The supervisory class is not to be protected under the law, is that right?

Mr. COLEMAN. That is correct.

The CHAIRMAN. If we could find some cases that developed that, if there is any litmus test for objectivity, this might be a good one.

Mr. COLEMAN. That is one of many, many areas that are involved under the National Labor Relations Act.

The CHAIRMAN. Would you consider it a good one to examine?

Mr. COLEMAN. I think it is an important area, along with numerous others that we have mentioned.

The CHAIRMAN. I know that Mr. Thompson has some reservation about Mr. Truesdale in a couple of cases; I think Abilities & Goodwill was one in your statement, Mr. Thompson, and this dealt with supervisory exclusion.

Let me just point out that in his record of decisions, there are a couple of cases that followed those that you mentioned in your testimony, Brothers Three Cabinets and Sheraton Puerto Rico Corp. I am sure you are more familiar with them than I, but I am familiar with them enough to know that Mr. Truesdale in those cases last mentioned, Brothers Three Cabinets and Sheraton Puerto Rico Corp.—Mr. Truesdale, it impressed me, applied a very strict supervisory exclusion test.

In fact, this came to the attention of John Irving. We are all familiar with John Irving, and can we say that he has been part of the National Labor Relations Board long enough to make an evaluation of his objectivity? We have confirmed him here and reported favorably on his confirmation, and I believe that you people felt favorably about Mr. Irving's objectivity, am I right?

Mr. THOMPSON. He and I had our differences, but generally I think Mr. Irving is considered objective.

The CHAIRMAN. I think he has been quoted favorably here at this hearing.

Mr. THOMPSON. Not by me.

The CHAIRMAN. By some of my colleagues here.

Mr. THOMPSON. If you are trying to get me to say that Mr. Irving is generally an objective person, I would say yes, although he and I did have our differences at times.

The CHAIRMAN. That does not exclude him from being competent to undertake the work that he did when he was there, though.

Mr. THOMPSON. I think he did a fairly good job, yes, sir.

The CHAIRMAN. Well, I was impressed with a statement, and I am going to read it; it appeared in a speech, not in a decision. Of course, he is on to private pursuits now. But he said in a speech at the American Bar Association, and he was speaking of our nominee:

> As Board member Truesdale points out in his Nevis dissent, the Board has extended far too broadly a formerly narrow category of supervisory discharges that have been held to violate the act. Since we have the good fortune of having John Truesdale with us today and because I find myself in agreement with much of the analysis set out in his dissenting opinions in three of these cases, I will defer to him to relate the details of these latest decisions.

Now, that is a statement of a man who is now qualified to have the respect of all, and it deals with a test of objectivity, the supervisory exclusion, which impressed me as one of the most useful guides for us at a hearing of this nature. Mr. Irving is highly complimentary of Mr. Truesdale.

Now, let me go on, Mr. Thompson. My understanding of the case you mentioned in your statement, Abilities & Goodwill, is that it did not deal with the legality of the supervisory discharge, but rather with the legality of employee protests over the discharge of a supervisor. The Board, as well as the Federal courts, have held that such protests are protected if the supervisor involved has a direct impact on the employee's own job interest and on the performance of the work he is hired to do. Under such circumstances, they have a legitimate concern with his identity.

In this particular case, the employees were social workers and rehabilitation professionals, so I can see why the Board might have thought there was a close enough relationship with the supervisor so as to make their protest a protected activity. The real point is that this is an extremely limited exception to the supervisory exclusion which does nothing to protect the supervisor himself.

Now, do you not think it is a bit of an exaggeration to say that it effectively blunts the other cases that Mr. Truesdale has been involved in, and you agree with the position that he stated in those cases?

Mr. **Thompson**. Well, if I may have as long to answer your question as you took to ask it, I would like to cover all those points.

Let us start with John Irving. I read his dissertation at the American Bar convention. Unfortunately, I was unable to go there because you were having an extended debate on Mr. Zimmerman's nomination and I was so enthralled with it that I sat in the gallery and listened to it rather than going to the American Bar convention.

The **Chairman**. I noticed you in the gallery; you were family.

Mr. **Thompson**. I was in the family section, fortunately; that is correct. I have been there so much, I feel like a part of your family.

The **Chairman**. The people up there have been notified that that is your seat. [Laughter.]

Mr. **Thompson**. I appreciate that, Senator.

Senator **Hatch**. Thank you, Pete; we appreciate that.

Mr. **Thompson**. The people of New Jersey should know how well you treat me. [Laughter.]

Going to John Irving, he went to the convention in Hawaii where this speech was made, and Mr. Truesdale was in Hawaii, along, I think, with most of the other members of the Labor Board.

I took the speech as a rather critical speech of Labor Board decisions in its entirety. He did refer to John Truesdale as his good friend and said that they were fortunate he was there. I do not deny that; I consider him my good friend and I think it is fortunate that he is here today. I do not know what that has to do with what we are here today to discuss.

Mr. Irving also made another speech where he was more critical of the Board and its current trend of decisions than he was in this speech. I think both of them ought to be in this record, because they point up many of the points that we have tried to make with you here today and in our previous testimony, and that is the trend of decisions that this Board is following and that Mr. Truesdale is participating in. That is the basic point.

Now, if you are talking about Mr. Truesdale's creditable recognition that supervisors are excluded from the so-called protection of this act, I give him credit for recognizing that. I would recognize that Mr. Truesdale can read and that he read in the act that supervisors are excluded from the protection of the act. I think we all know that; I do not know why it would be such a great accomplishment for a member of the Board to recognize what the law says.

The CHAIRMAN. But if anyone were really bent on stretching the law beyond its clear purpose, this would be a way to do that, and that would be a nonobjective person who had a mission would do. We do not need "mission" people in these jobs; that is the way it looks to me.

Mr. THOMPSON. Well, I kind of agree with you there.

The CHAIRMAN. But that is the place where they would move in if they had a mission and the mission were prounion or prolabor. They would broaden the protected class.

Mr. THOMPSON. Well, if one of these missionaries were so disposed, he probably would not pick such an obvious area, particularly if he is wanting to get renominated and confirmed by the Senate, so that is about where I would write off that decision. I would think it would be such an obvious distortion of the act to find supervisors all of a sudden covered by it that Mr. Truesdale would stand to be denied his confirmation by this body on that alone, if he made such a decision as that.

Let us talk about this *Abilities & Goodwill* case that you talked about several times, because I think that is a perfect example. You had in that case members Fanning, Jenkins and Truesdale in the majority, and you had members Penello and Murphy in the dissent.

Shall I start over? I noticed that I caught your attention.

The CHAIRMAN. Yes.

Mr. THOMPSON. In that case, you had members Fanning, Jenkins and Truesdale in the majority; this is the *Abilities & Goodwill* case that you mentioned. You had members Penello and Murphy in the dissent. In that case, for the first time, I think, the Board decided that 21 strikers should be given back pay and, I think, reinstatement, when they had not even asked for reinstatement; they had not even informed the company that they wanted to come back to work.

It is a wide departure from established precedent, which I think is a clear indication of not only the direction this Board is taking, but the direction that Mr. Truesdale will take with it; he is right there on the majority. And there is a very strong dissent by members Murphy and Penello on this departure from established precedent. That is a better example, than simply recognizing that there is a clear sentence in the statute which says supervisors are not covered.

Mr. Chairman, could we have Mr. Irving's speeches included in this record?

Senator HATCH. Mr. Chairman, I move that they be included.

Mr. **Thompson**. I asked last time that former Chairman Miller's recent speech, which was highly critical of this Board, also be included.

Senator **Hatch**. Why do we not put all of them in the record?

The **Chairman**. They are already in the record.

Mr. **Thompson**. Thank you. I think those speeches are very revealing, and if you want an objective analysis by former participants from within, they are pretty revealing, objective observations of this horrible trend in these cases.

The **Chairman**. What is Mr. Irving's activity now?

Mr. **Thompson**. He is a practicing lawyer with a firm known as Kirkland & Ellis. I am hesitant to tell you this, but I think he is representing management.

The **Chairman**. Why do you hesitate? I do not hold that against anybody.

Mr. **Thompson**. I have a feeling every time I come before you that we are considered some kind of enemy types when we come and appear, particularly to oppose some appointment by the President of your party.

The **Chairman**. Now, wait a minute. Did I hear the word "enemy?"

Mr. **Thompson**. Yes, sir.

The **Chairman**. No, no.

Mr. **Thompson**. Albeit we are treated politely; I do not mean to say that you do not treat us politely. But I have the distinct feeling in your questioning that you do not exactly consider us friendly to your cause.

The **Chairman**. I am glad you did state that Mr. Irving is in private practice with a distinguished firm and he is a management attorney.

Mr. **Thompson**. That is correct; so is Mr. Brown and so is Mr. Barbash and so is Mr. Nash, who was prominently mentioned here last time, and so am I and so is Mr. Coleman.

The **Chairman**. And I have quoted them all in support of a strong feeling that Mr. Truesdale has proven to be one of our most competent nominees for a position on the National Labor Relations Board; I have used Nash, Barbash, and Irving.

Mr. **Thompson**. I do not think Mr. Irving has expressed support for Mr. Truesdale.

The **Chairman**. Only in his speech where he talked about that supervisory exclusion.

Mr. **Thompson**. You might be interested in a conversation I had with Mr. Brown, who is an old friend of mine and whose letter you read to us last time.

The **Chairman**. I did not mention Brown; I did not open the door to that.

Mr. **Thompson**. Well, you read the letter the first time we were here.

The **Chairman**. I put it in the record, yes.

Mr. **Thompson**. He wrote a letter supporting Mr. Truesdale. I called him on the phone and asked him why.

The **Chairman**. I am going to do something that any lawyer is crazy to do; I am going to read a letter that Mr. Luby has just handed to me and that he has not handed me before, and I have not read it yet.

Mr. THOMPSON. Read it; it ought to be fun.

The CHAIRMAN. This is going to be with fingers crossed; you never ask a question or read something when you do not know what it is all about, but here I go.

This is August 27, from Harry L. Brown:

> Dear Senator Williams. The question has apparently arisen as to whether my endorsement of John Truesdale for reappointment as a member of the National Labor Relations Board was solicited by him. The answer is no. I initiated the endorsement.
>
> As you will note by copies of my letters to Senators Hatch, Humphrey, Danforth, and Eagleton, copies of which have already been sent to you, I wrote to them on July 29, 1980 because I was concerned that a good man might be rejected for political reasons. I initiated those letters on my own and followed through on my own. I hope this clears up any apparent misunderstanding. Very truly yours, Harry L. Brown.

[The letter referred to follows:]

SPENCER, FANE, BRITT & BROWNE

BYRON SPENCER (1883-1964)

IRVIN FANE
JAMES T. BRITT
HARRY L. BROWNE
JOSEPH J. KELLY, JR.
WILLIAM H. WOODSON
ROBERT P. LYONS
RICHARD H. SPENCER
DONALD W. GIFFIN
LOWELL L. SMITHSON
MAX H. BERGMAN
JAMES R. WILLARD
GAD SMITH
EDWARD A. SETZLER
RICHARD W. SCARRITT
JACK L. WHITACRE
BASIL W. KELSEY
JEROME T. WOLF
MENDEL SMALL
JAMES M. WHITTIER
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CARL H. HELMSTETTER

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IN REPLY, PLEASE REFER TO

FILE NO.

August 27, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Committee on Labor and
Human Resources
United States Senate
Washington, D. C. 20510

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I hope this clears up any apparent misunderstanding.

Very truly yours,

Harry L. Browne

HLB:hm

The **Chairman**. Now, what were you going to say about Mr. Brown?

Mr. **Thompson**. I could have saved you a lot of trouble there. I talked to Mr. Brown on the telephone, and he is an old friend of mine. He told me that it was unsolicited, and I was just about to say that, but you have said it for me.

But I want to tell you something else he said that I thought was rather humorous. I said, "Well, why are you going out of your way, Harry, to support John in this way?" He said, "Well, I do not think he is nearly as bad as Fanning and Jenkins." I said, "Well, that may be." [Laughter.]

I just thought you might be interested in his rationale.

The **Chairman**. We hear that in another context a lot these days. [Laughter.]

Mr. **Thompson**. According to Mr. Brown, Mr. Truesdale is less worse.

The **Chairman**. That is what I am thinking; in another context, we hear that.

Mr. **Thompson**. I caught your remark, sir.

The **Chairman**. Well, let me just make a final observation on *Abilities & Goodwill*. It was decided pursuant to the very limited exception that we have just been talking about, and this exception is one that the courts have recognized.

Now, let me go on to another area, if I could. We are not strictly observing that light, but it gives us a little frame of reference, all four of us.

Mr. **Thompson**. That is the first time anybody has told me what that light was for.

The **Chairman**. Mr. Thompson, you have criticized Mr. Truesdale for undermining the Spielberg-Collyer principle of deferral to arbitration results. However, in the *Kansas City Star* case, he rather powerfully reasserted the Spielberg principle in deciding to defer to an arbitration result.

This is another area that seems to be particularly important these days when we are trying to find ways to really get on to a little higher ground than we might have been in terms of labor and management coming together to try to work things out, to get on to that day of greater productivity within our economy.

Arbitration, it would seem to me, is a very civilized way of coming to settlement of dispute, and so let us use this as another area to explore Mr. Truesdale.

We come back to the *Kansas City Star* case, and we have this from Mr. Truesdale:

> Under Spielberg, the Board will respect the parties' choice of arbitral forum and will accord recognition to the arbitrator's resolution of their dispute, so long as the proceedings meet certain criteria: (1) they are fair and regular; (2) the parties have agreed to be bound; and (3) the arbitrator's decision is not clearly repugnant to the policies and purposes of the act.
>
> The parties having chosen this forum, the Board binds them to the arbitrator's decision, unless they can show that one of the criteria has not been met. The Board has not, however, refused to defer to an arbitrator's decision simply because, in the Board's judgment, the record evidence is susceptible to other inferences. Rather, the Board has acted more like a reviewing court and has not engaged in a de novo review of the record evidence.

Now, as you will recall, the nominee, in criticizing Members Fanning and Jenkins, added this:

> In my view, the vice of my dissenting colleagues' conclusion is their willingness to engage in a de novo review of the evidence. This willingness to review the evidence exhaustively and then substitute their judgment for that of the arbitrator can only serve to undermine the integrity of the arbitral process.

It seems to me that these statements scarcely sound like an attempt to undermine Spielberg. What do you think?

Mr. THOMPSON. I did not understand your question.

The CHAIRMAN. This is Truesdale on arbitration——

Mr. THOMPSON. In what case?

The CHAIRMAN. This was the *Kansas City Star;* the thing that I quoted from Truesdale was written in the *Kansas City Star* case, where he was critical of two members of the Board, Fanning and Jenkins.

I just wanted to say that if you people are really conscientious about trying to find someone for that Board who is not locked into a side, these are the cases that show that there is no lock in by Truesdale into any prounion, prolabor position, as you fear.

Here is arbitration; again, would you not agree that it is a civilized way for people in dispute to agree?

Mr. THOMPSON. I agree that arbitration is civilized.

The CHAIRMAN. Yes.

Mr. THOMPSON. If you take *Kansas City Star,* which is a 1978 case, and come up through these other cases that we have cited in our testimony—and this is one reason I wanted to get John Irving's speech into this record, because he has done this, I think, very effectively—you see a definite change in Mr. Truesdale from being critical of his colleagues to being 100 percent with them on this same issue. It is a rather dramatic shift, it seems to me, in his position on this question of the civilized arbitration process.

The problem that we have always had with this arbitration question is not one of whether it is civilized or not, but one of which forum is going to decide an issue or a dispute, or whatever.

Senator HATCH. And whether there is going to be two bites of the apple, too, is it not?

Mr. THOMPSON. That is correct, sir; that is my point. I think we have gone a little bit of a full cycle here in the sense that we start out with deferral to arbitration, or maybe we started out with not deferring to arbitration, and then the Board seemed to go full bore toward deferral to arbitration, and now it seems to have come back to two bites of the apple, as Senator Hatch said.

Mr. Truesdale may not have been up with the changes to the last minute and he got off into a dissent in one place along the way, but he is back fully on board now, as I read the decisions. This point is one that I think is illustrative of what we are faced with in these days of this Board. They are going the other direction now on arbitration treatment; they are going away from what you applaud, and that is the civilized use of arbitration. They are going toward, "Use arbitration and if you do not get it there, come to the Board and we will give you another shot at it."

Senator HATCH. That is what we mean by two bites of the apple, right?

Mr. THOMPSON. Yes, sir, that is correct, and we think that is wrong.

Senator Hatch. And when they come before the Board, they get a real good shot at it, do they not, under the present Board decisions?

Mr. Thompson. Well, the way this Board is going, I think they probably take two or three bites at the apple themselves.

Senator Hatch. As a matter of fact, they know they are going to win.

Mr. Thompson. That is correct.

Mr. Coleman. Well, Senator, let me chime in there. I was recently involved in an arbitration case that took 2 days to prepare and 1 day to hear. The union was represented by an attorney. We went through that whole proceeding; we got a decision that was favorable to our point of view.

Two weeks after the arbitration, after both sides went to all the time and expense arbitrating this very issue before an impartial arbitrator, the union turned around and filed an unfair labor practice charge with the Board. I have had contact with the Board investigator and they have almost as much as said that on the basis of these decisions like *Suburban Motor Freight*, they are not going to defer to the arbitration award.

Senator Hatch. As a matter of fact, Mr. Coleman, in the *Suburban Motor Freight* case, this was a decision in which Mr. Truesdale was again in the majority?

Mr. Coleman. That is correct.

Senator Hatch. The Board held that it would no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator.

Mr. Coleman. That is correct, and the case that Senator Williams quoted, the *Kansas City Star* case, was a case that was early in Mr. Truesdale's term, and now he has done a complete flip-flop on that very issue.

Senator Hatch. In just a matter of 2 years.

Mr. Coleman. In just a couple of years, and that is one of the things that concerns us. In the *Suburban Motor Freight* case, Member Penello severely criticizes Member Truesdale for his flip-flop position in this regard. This is one of the things that we are so concerned about.

The Board is always crying about being so overloaded and overworked. One way they can cut down on their caseload is by giving arbitration awards that are conducted in a fair and impartial manner the deference which they deserve, and they can save not only the Board a tremendous amount of money, but the private parties as well.

My client, in the case that I was referring to, had to spend a tremendous amount of time, money, and energy preparing for this arbitration case. Now, to say that it is all for naught because the Board is going to start all over again on the issue, to me, is a waste of everybody's resources.

The Chairman. What we want to do to make sure we have the best evidence in this area of arbitration with respect to analysis and attitude by Truesdale. Therefore, we should take the last case he is involved in, right? Would that not be the logical thing to do?

Mr. Thompson. Well, I would say that if you are putting this kind of measure on a man, it seems to me that you have to look at all of his decisions in the subject area.

The Chairman. All right, but we are now dealing with this arbitration area, which we have established as a good area for inquiry. You are saying there is a flip-flop. My point is that there are no sides here; there are issues. We try to get a nominee before us and try to understand how he looks at issues.

We are talking about arbitration and the way they handle it at the Board. The last case that has come to my attention is one of rather recent moment—Bay Shipbuilding is only a week and a half old. Now, here is what Truesdale said in *Bay Shipbuilding,* 251 NLRB No. 114. You have that citation, Orrin, is that not right?

Senator Hatch. I am not sure.

The Chairman [reading].

> My dissenting colleague, however, argues that this case should be governed by *Suburban Motor Freight, Inc.* With all due respect, I believe that my dissenting colleague misapprehends the holdings of *Suburban Motor Freight* and *Atlantic Steel,* respectively.
>
> Contrary to the instant case, in *Suburban Motor Freight* the parties had not presented the arbitrator with the evidence relevant to the unfair labor practices. For this reason, I joined a majority of the Board in finding that deferral was inappropriate. We are not presented with a *Suburban Motor Freight* issue in this case, for here the arbitrator was presented with the evidence relevant to the statutory claim.

That is the last expression, and it was pure deferral; there is no doubt about it. He finds a clear distinction with *Suburban Motor Freight.*

Mr. Thompson. That sounds like that came down between the last hearing we had and this one.

The Chairman. Yes. Let us go back and look at the exception in *Suburban Motor Freight.*

Mr. Thompson. It is almost self-serving.

The Chairman. I beg your pardon?

Mr. Thompson. I said that decision is almost self-serving for the purposes of this hearing; it is so current. I have another one that I think you may have overlooked.

The Chairman. You are a cynic through and through.

Mr. Thompson. Never.

The Chairman. You are a cynic through and through. Let us go back and be analytical; we should not be judgmental here.

Mr. Thompson. I have another recent case here.

The Chairman. Let us be analytical.

Mr. Thompson. All right, sir.

The Chairman. I would like to make sure that we understand how limited an exception *Suburban Motor Freight* is to the Spielberg principle of deferral. Our biblical text here is Spielberg, and now we have an apparent exception to it and I am just saying that it is very limited.

Mr. Truesdale and Mrs. Murphy explained it rather admirably, in my judgment, in *Atlantic Steel.* They said:

> The Board added the requirement to Spielberg that in order for the Board to defer, the arbitrator must have considered the unfair labor practice in his decision. Since that time, there has been little discussion by the Board as to what this requirement means. Must the arbitrator actually discuss the unfair labor practice,

> or is it sufficient that he or she consider all of the evidence relevant to the unfair labor practice in determining whether the discharge was lawful under the contract?
>
> A review of the decisions shows that while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision.

Now, after examining this case, I have to respectfully disagree with the assertion that has been made here that the Board is giving employees two bites of the apple. So long as the full factual circumstances surrounding a dispute are presented, all questions will be decided in arbitration and the Board will defer.

Mr. THOMPSON. That is wonderful, if you can indulge in retrospect as you have done there, and as they have done there. But if you look at this line of cases, now, Spielberg was a deferral doctrine; *Suburban Motor Freight* deviated from it and, as I read it, inserted the requirement that the facts of the unfair labor practice must have been decided in the arbitration case in order for there to be a recognition or deferral.

Now, you come along with that case, which simply says they do not have to call it an unfair labor practice case, they just simply have to have gone into the entire factual situation. I do not take that as a change from *Suburban Motor Freight.*

Senator HATCH. What *Suburban* really says—and I think, you know, it is a very tough legal point that has to be observed very carefully—what *Suburban* really says is that the Board will no longer honor Spielberg, unless the unfair labor practice issue before the Board was both presented to and considered by—

Mr. THOMPSON. That is right.

Senator HATCH. Now, that is the second part; that goes way beyond any theory of arbitration I have ever heard.

Mr. THOMPSON. That is correct.

The CHAIRMAN. I am going to submit this whole question to arbitration.

Mr. THOMPSON. That is wonderful.

The CHAIRMAN. We have a professor aboard, and if there is anybody that is lofty and olympian and above the storm, it is the professor, and the professor is going to arbitrate this. Professor Goldberg, are you going to be ready to arbitrate?

Mr. THOMPSON. I thought you were referring to me. [Laughter.]

Senator HATCH. Bob was a professor in labor law.

The CHAIRMAN. Yes.

Senator HATCH. In addition to being a professor, he has had a wealth of experience in the practice of labor law.

The CHAIRMAN. Now, he is down on the plains of common—

Mr. THOMPSON. I have had a wealth of experience in the school of hard knocks, mainly the practice of law, unlike Mr. Truesdale, I might point out, who has never practiced law a day in his life as far as I know.

That is another problem with this Board that ought to be pointed up. You do not have anybody on this Board that I know of who has ever actually been out there in the field where those of us who struggle along are.

The **Chairman**. You called me the enemy. I am going to call you an octopus; you have more tentacles and can reach out and form more problems than anyone I know.

Mr. **Thompson**. I do the best I can, Senator. You know, I am not on the Government payroll, and those of us who have to survive in the private sector have to do the best we can, and that is all I am doing.

The **Chairman**. Because of the time limitation, we are not going to be shut off by any objection——

Senator **Hatch**. No; we are not.

The **Chairman**. But we have to be fair to other witnesses too. I hope that later witnesses will give us some observations on this question of deferral to arbitration.

Mr. **Thompson**. I want to be sure that our position is clear, and that is that we favor deferral to arbitration, because we think it is a civilized way to handle these matters.

The **Chairman**. It seems to me that it is clear that Mr. Truesdale strongly concurs in the philosophy of arbitration.

Mr. **Thompson**. That is not what we see.

The **Chairman**. We will have later observations on this.

Mr. **Thompson**. I think we are in agreement with you, but I am not sure Mr. Truesdale is because of the *Suburban* case; I think that is where you ought to zero in. Perhaps he can enlighten us and you on that.

The **Chairman**. Very good.

Mr. **Thompson**. If I could raise a point, I have the feeling I am about to be——

Senator **Hatch**. Well, this is your second trip back here, all five of you, and I have a lot of questions of you and I am going to ask them today. If we go longer, that is fine with me. I have cleared my schedule and I am prepared to stay as long as the chairman wants to.

Mr. **Thompson**. Well, we are here for as long as you would like us to be here—right on through the weekend, if you like.

Mr. Chairman, I understand that Mr. Nash has also written you another letter in connection with Mr. Truesdale. Would it be appropriate to ask that that letter be put into this record?

I do not have a copy of it; I probably could get one. But I think he did a——

The **Chairman**. I will do my best to try to find it.

Mr. **Thompson**. Well, could we have a copy if you do find it? Since we have Mr. Brown's full view, I think we ought to have Mr. Nash's. All we know so far from Mr. Nash is what the newspapers told us.

The **Chairman**. I am going to be in the same situation I was with Mr. Brown's letter; I have not read it.

Senator **Hatch**. Maybe your staff has it and we could read it right here. We could be just as adventuristic in reading that as we were reading Mr. Brown's letter.

Mr. **Thompson**. I think it is rather thrilling.

The **Chairman**. I hate to say this, but the Nash letter is in my briefing book, which is an admission that I have not fully digested all of the briefing book, I guess. Well, here it is and it will be included in the record. It is dated August 28, addressed to me, re renomination of John Truesdale to the National Labor Relations Board. It is a long letter.

Senator HATCH. That is all right.

Mr. THOMPSON. If we could just have a copy of it; I do not know that you need to read it into the record.

The CHAIRMAN. It will be in the record; you will be able to see it. I would like to read it too.

Senator HATCH. May I have a copy of it too, Mr. Chairman? Could we get one made?

The CHAIRMAN. Yes.

[The information referred to follows:]

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August 28, 1980

Senator Harrison A. Williams
Chairman
Committee on Labor and Human Resources
Dirksen Senate Office Building
Washington, D.C. 20510

Re: Renomination of John Truesdale to
the National Labor Relations Board

Dear Senator Williams:

I have been asked by you and others whether I was correctly quoted in a recent Washington Star article indicating that I support Mr. Truesdale's renomination. I suspect the question is being asked because of the concerted Management opposition to the reappointment of Mr. Truesdale to the National Labor Relations Board and the fact that I am a labor lawyer representing Management's interests. The simple answer to that question is that I do support Mr. Truesdale's renomination.

I think it only fair, however, to explain that my support of Mr. Truesdale is purely personal on my part and does not, to the best of my knowledge, represent the view of any other management representative, of any clients of my law firm, or the view of any of my law partners or associates.

The reasons for my personal support of Mr. Truesdale are two in number. First, and foremost, John has been a very close personal friend for approximately ten years. We have been guests in each other's homes on many occasions, have traveled together, and have worked together. Even if I disagreed with every decision he has made as a Board member (which I do not), that close friendship would make it difficult for me to do other than support his renomination efforts.

Second, in my judgment, Mr. Truesdale is an intellectually honest and dedicated Board member. While I may disagree with some of his decisions as a Board member, I do not believe that his entire record indicates a consistent bias in favor of Labor's position. For example, although Mr. Truesdale may be criticized by some Management representatives for his decision in General Knit of California, which reset stringent standards restricting labor and management misrepresentations during a union organizing campaign, I believe the statistics for the last few years indicate that these stricter standards have been successfully used more often by Management than by Labor in setting aside election losses. Thus, although I personally believe that the General Knit standards represent an unrealistic effort by the Board to protect against non-existent employee naivete, it is difficult for me to characterize that decision as pro-union.

Finally, I have been asked by some to rationalize my support of Mr. Truesdale with my opposition to the nomination of Mr. Lubbers as NLRB General Counsel. Thus, because I opposed Mr. Lubbers strictly on the basis of his close relationship as an assistant to Board Chairman Fanning for many years, I have been asked why the same consideration does not apply to Mr. Truesdale's renomination as a Board member. First, it should be noted that Mr. Truesdale was appointed Executive Secretary (the position both he and Mr. Lubbers held immediately before their Senate confirmations as Board member and General Counsel, respectively) of the NLRB during Mr. Edward Miller's term as Chairman of the Board (not Mr. Fanning's term) and during a time when three Republicans sat on the Board. Second, the concern I voiced over Mr. Lubbers' nomination as General Counsel was based upon the fact that the General Counsel, as an advocate before the Board, should be independent of the Board itself, both in fact and in public perception. My feeling at the time of Mr. Lubbers' nomination was that his close association with Chairman Fanning over the years would destroy the perception of independence which I felt vital to the effectiveness of the Agency. However, in my judgment, the same concern does not exist in the appointment of Board members. The fact that two or more Board members may have worked closely together over the years is not as critical, for each Board member performs the same function as each of his colleagues, not an independent function as is true of the General Counsel.

Thank you for the opportunity to express and explain my views on John Truesdale's renomination. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Peter G. Nash

Peter G. Nash

Senator HATCH. Mr. Thompson, in *General Motors Corp.*, which was a National Labor Relations Board case, and again in *White Farm Equipment*, Mr. Truesdale participated in the majority in requiring the employer to provide the union with information regarding race, color, national origin, religion, and sex of the employees in the bargaining unit.

Now, how does the chamber of commerce and, I might add, NAM, view these intrustions by the NLRB into areas of the law outside the realm of their presumed expertise?

Might I also add, is this not inconsistent with other laws in the Federal Government that require the employer not to even ask for this type of information?

Mr. THOMPSON. Yes, sir. This *General Motors* case, which is 243 NLRB No. 19, is a matter of great concern, and it is a case which was decided by a majority of Chairman Fanning and Mr. Truesdale, with a dissent by Member Murphy.

This case illustrates the Board's present propensity to reach out into areas which really——

Senator HATCH. Let me make one other point. Most of these cases are decided by panels of three; is that correct?

Mr. THOMPSON. Right.

Senator HATCH. In this case, you had Mr. Fanning, Mr. Truesdale, and Mrs. Murphy?

Mr. THOMPSON. That is right.

Senator HATCH. Now, the reason why it is good to have panels with minority viewpoints is that you get a minority dissent; is that not correct?

Mr. THOMPSON. That is correct.

Senator HATCH. And it is amazing how often the minority dissents are sustained on appeal, is it not?

Mr. THOMPSON. Well, Mrs. Murphy and Mr. Penello, I think, hold world records for having their dissents sustained by courts of appeals.

Senator HATCH. The point that I am making is, with 4 to 1 on the Board, that makes it possible that there basically will not be any dissents except in relatively minor, insignificant, or inconsequential cases.

Mr. THOMPSON. That is correct. Mr. Penello's term has less than a year to run; I do not know where we will be then.

Senator HATCH. But that also creates a problem in the Federal courts, because not every Federal judge—in fact, I would have to say the vast majority of Federal judges do not have experience in labor law, which is a specialized practice; is that not correct?

Mr. THOMPSON. That is correct.

Senator HATCH. So, if they do not have the benefit of those dissenting opinions, for whatever worth those are, it will be very, very difficult for them to have the analysis of experts in the field who have alternative points of view to those in the majority in these cases; is that correct?

Mr. THOMPSON. Yes, sir, and I think the distinguished Senator recognizes perhaps a broader proposition here, and that is the great value of dissenting opinions in all judicial proceedings.

Senator HATCH. No question, but especially here.

Mr. **Thompson**. Especially in areas of expertise like labor law, where the courts themselves and the concept of the law recognize that you do need a board made of experts who can zero in and bring their expertise to play on complex issues in the field.

Senator **Hatch**. Well, if I could just interrupt you one more time, I am sorry to do that. I know I have that propensity and I know you are doing a very effective job of testifying here.

In 1976, for instance, the appellate court affirmance rate of NLRB decisions—Mr. Truesdale came on the Board in 1977—but in 1976 the affirmance rate of National Labor Relations Board decisions was 74 percent. During fiscal year 1980, with Mr. Truesdale serving as a Board member, the affirmance rate fell to 64.1 percent.

While we are talking about John Irving, former General Counsel John Irving has stated in public on more than one occasion, to my understanding, that these growing reversals of Board decisions by the courts often contain sharp statements of frustration and judicial exasperation which "reflect a feeling that the Board is not acting responsibly."

Have you heard statements like that?

Mr. **Thompson**. Yes, sir; I am familiar with Mr. Irving's statement to that effect. I think it is contained in one of these speeches that I asked to be included in the record.

Senator **Hatch**. Well, this is a little bit more than scrutinizing case-by-case problems, is it not?

Mr. **Thompson**. Unquestionably.

Senator **Hatch**. Well, getting back to the other point, what about these issues raised in *General Motors Corp.* and *White Farm Equipment*, and the inconsistency of a Board that does not seem to understand what the rest of the Federal laws say as well?

Mr. **Thompson**. Well, to me, there are several inconsistencies here. One is that it is an illustration of how this particular Board seems to know no limits in where it will reach to extend its jurisdiction both as to parties, industries, subject matter, or whatever.

Here, it involved equal employment data that was maintained by the employer. It is almost impossible to see how the National Labor Relations Board should even consider that it ought to be getting into this area, and yet it is typical of this Board. Here they go, and they go right into it.

They have gone into other areas, such as OSHA, in which they just simply have no business. They come in here at budget time and talk about how they are overworked and how they need more money, and they come in here when you have your labor reform movement and they want to expand the size of this Board because their workload is increased.

Then they turn around and, by their own hand, increase it by extending their jurisdiction and by going into subject areas like the Spielberg change and like this *General Motors* case, so that they are almost manufacturing the crisis from which they then come in and seek to obtain some relief.

Mr. **Coleman**. Senator, I might add that in the *General Motors* case the type of information that Mr. Truesdale, along with some of his colleagues, voted to open up is—if I might read some of the information that the NLRB said a union could demand and be enforced through the auspices of the NLRB—the union had requested the emplcyer, at the employer's expense, to provide all of the following information: all charges involving bargaining unit employees presently on file with any Federal, State or local fair employment practice agency; copies of all relevant administrative and court decisions; information as to correct status of all such charges; certain statistical data concerning hiring, seniority, job classification, and promotion of employees represented by the union, arranged by sex and certain racial groupings.

This was all despite the fact that to compile this type of information, at a minimum, it is estimated, would have taken 18,000 to 20,000 hours of work—just to compile that information.

Senator HATCH. It does not seem that the NLRB is very much concerned about the paperwork burden.

Mr. COLEMAN. Not with decisions like this, and it opens up such an opportunity for the unions to use this as a tactic of harassment with any employer with which they may disagree on a particular bargaining area.

Senator HATCH. The Board just blithely says, "You have to comply," right?

Mr. COLEMAN. That is correct.

Senator HATCH. Now, let me ask you this: Even if the business wanted to comply, would the business have that kind of information, and would the business be entitled under the Civil Rights Act to obtain that type of information?

Mr. COLEMAN. They may have some of it, but probably not in the form in which the union would request it. The union, in most instances, is equally capable of obtaining this information from its own members. I mean, its own members know what charges they have filed against the company in State or Federal proceedings.

The other problem here is the confidentiality of all of this type of information. Once it falls into the hands of the union, there is no telling what may be done with the information. In effect, the employer is being asked tc provide information that the union may, in turn, use as a basis for filing a broad class action suit against the employer.

The real problem here is that we have a Federal agency already in place that is designed specifically to deal with matters of discrimination.

Senator HATCH. Well, how would the EEOC react to the employer asking its employees about their religion, for instance?

Mr. THOMPSON. I think they would take a dim view of it.

Senator HATCH. They would do more than take a dim view, would they not?

Mr. THOMPSON. Senator Hatch, I think we might be able to emphasize two of your points. One is the value of dissent and the other is the trouble with this particular line of cases.

Former Chairman Murphy, as a member, dissented in these cases. In the *White* case, for example, she expressed concern over what she characterized as a fishing expedition where this information was sought. Then she said she was concerned over "my colleagues' infringement into matters properly left to the expertise of the Equal Employment Opportunity Commission."

In her dissent in the *General Motors* case she said, "Although there is a great deal of awareness in the United States these days as to the cost of regulation, evidently there is not enough," referring to the lack of concern on the part of her colleagues to the cost of compiling all of this information which really seemed to be irrelevant into anything else that any of us are aware of.

I think that those remarks that were made in those dissenting opinions clearly point up the trouble with the General Motors type of case.

Senator Hatch. They also point up the necessity of having dissenting opinions to point out these very important aspects, and the inconsistency of one agency of government requiring something that another agency says an employer cannot obtain.

Mr. Thompson. That is right.

Senator Hatch. Might I also ask you, as labor lawyers, since those decisions have been rendered, have you seen an upswing in the requests for these fishing expedition approaches?

Mr. Coleman. I think we have, Senator. In fact, this type of decision on the part of the NLRB merely encourages unions to make as broad requests as possible.

Senator Hatch. They make it as miserable as they can, so you have to either compromise or cave in.

Mr. Coleman. Well, that is right. It also gives them another bargaining tool, which I think throws the balance out of kilter. If they can stand there and make a request for basically unlimited types of information along these EEOC lines, then they can negotiate—and the NLRB would permit this type of inquiry—then they are in a position to negotiate with the employer, "Well, we will not request quite so much information if you will make concessions in other areas," again disturbing the whole balance of the collective bargaining process.

Mr. Thompson. Senator Hatch, in response to this last question of yours, I have seen a number of instances where the information was requested, and rather than go through this cumbersome and expensive Board process, the information was furnished to the union, only to have a class action filed against the employer, only to have the class action offered as one concession in the overall settlement of a larger bargaining situation or a larger dispute.

In other words, this kind of tactic is used to get the information to provide the support for the title 7 cases under the Civil Rights Act, which is used then for leverage to bring about a settlement on another point totally unconnected.

Senator Hatch. The employer is damned if he does and damned if he does not.

Mr. Thompson. Well, I would characterized it as the employer being required to dig his own grave before he is shot and thrown into it; that is about what it amounts to.

Senator Hatch. Well, who pays for the 18,000 to 20,000 hours of time to gather this type of material so that they can then be sued by the EEOC?

Mr. Coleman. The American consumer obviously pays for this, ultimately, Senator.

Senator Hatch. Do you think that might have anything to do with inflation?

Mr. COLEMAN. I do not think there is any question about it. These reams of paperwork obviously add to the cost, and the employers are not going to be able to absorb these things on their own and they have to pass it on, and the American public is the ultimate victim.

Mr. THOMPSON. I think the New York Times article, the lead editorial on Labor Day that I mentioned earlier and I have asked to be made a part of this record, has an interesting sentence along that line. I do not mean to take this out of context, because it is really a very good article and it is fairly balanced. But this is an interesting sentence, I think:

> American unions are legal monopolies which increase members' wages largely at the expense of the 80 percent of the workforce that is not organized; they are potent political lobbyists advancing their members' interests, regardless of their economic productivity.

I think that is a pretty good characterization of this overall picture that you have identified, and that is the ever-increasing cost that is being put upon industry and which, naturally, is being passed along as best they can to the consumer and which does definitely feed the fires of inflation.

The CHAIRMAN. Do you want that in the record, Bob?

Mr. THOMPSON. Yes, sir.

The CHAIRMAN. We will take it.

Mr. THOMPSON. You will find that they did say in here that unions may be justified under some circumstances.

The CHAIRMAN. Yes, I know.

Mr. THOMPSON. I think it is a very good article and I commend it to your reading.

Senator HATCH. You feel it is balanced?

Mr. THOMPSON. Yes.

Senator HATCH. In *General Knit of California,* which is 239 NLRB No. 101, and it is a 1978 case, Mr. Truesdale again cast the deciding vote in reversing *Shopping Kart* and returning to the rule announced in *Hollywood Ceramics.*

Now, the Board uses a standard under which it will investigate the truth or falsity of statements made during the heat of a union organizing campaign. Could you explain to us the position of the chamber on this standard for review of election conduct?

Mr. THOMPSON. Senator Hatch, the *General Knit of California* case is one of the cases I was referring to earlier where the Board went through a short period of what I consider enlightenment, and then slammed the door again in this particular case.

The case itself narrows the ability on the part of both unions and employers, as I read it, in their campaign tactics, in their propagandizing, if you will, or in their efforts to inform employees prior to their making a selection of a bargaining representative or not.

In that particular case, you had a majority of Fanning, Jenkins and Truesdale. You had a strong dissent by Penello and Murphy, and it illustrates again the points you were making on dissents.

That was a case where the Board went back to the proposition that it had been following for a long time and which had been relaxed in an earlier case of *Shopping Kart.* They overruled *Shopping Kart* and went back to the narrow limitations which are placed upon employers and upon unions in campaigning.

It also brings up again the point I was making earlier that the Labor Board has always had this strong inclination to treat working people as though they did not have good sense. I do not know why that is, but they do not think that workers have sense enough to separate truth from falsehood. They do not seem to think that workers have enough sense to make up their own minds in some instances, where you get a certification in spite of a vote the other way.

This case, I think, is a clear reestablishment of that line of thinking, that workers should be protected from what they should be allowed to hear. If you had this in political campaigns, all of you fellows would be out of business, I think. I hate to say that. I am not suggesting that you deal in falsehoods, but you would be so concerned about what you said, you would not say it.

Senator **Hatch**. Somebody could sue you everytime you turned around.

Mr. **Thompson**. That is right, or some board would come along and rap your knuckles, or whatever. If you applied this case to politics, you fellows would find it very difficult to conduct your campaigns, not because you would be desiring to engage in falsehoods, but because you would be so concerned with whether you were technically stepping over a line.

Senator **Hatch**. It also brings up a whole new world of new decisions to decide, narrowly defining what can and cannot be said in union election campaigns.

The **Chairman**. You are having a nice conversation here, but I think Mr. Truesdale is on that side too.

Mr. **Thompson**. Not as I read it.

Senator **Hatch**. I notice that the light is on, Mr. Chairman.

The **Chairman**. Let me read the next paragraph from the New York Times editorial. The whole thing will go in, but Mr. Thompson read just one paragraph and I will read the next one. It states that unions

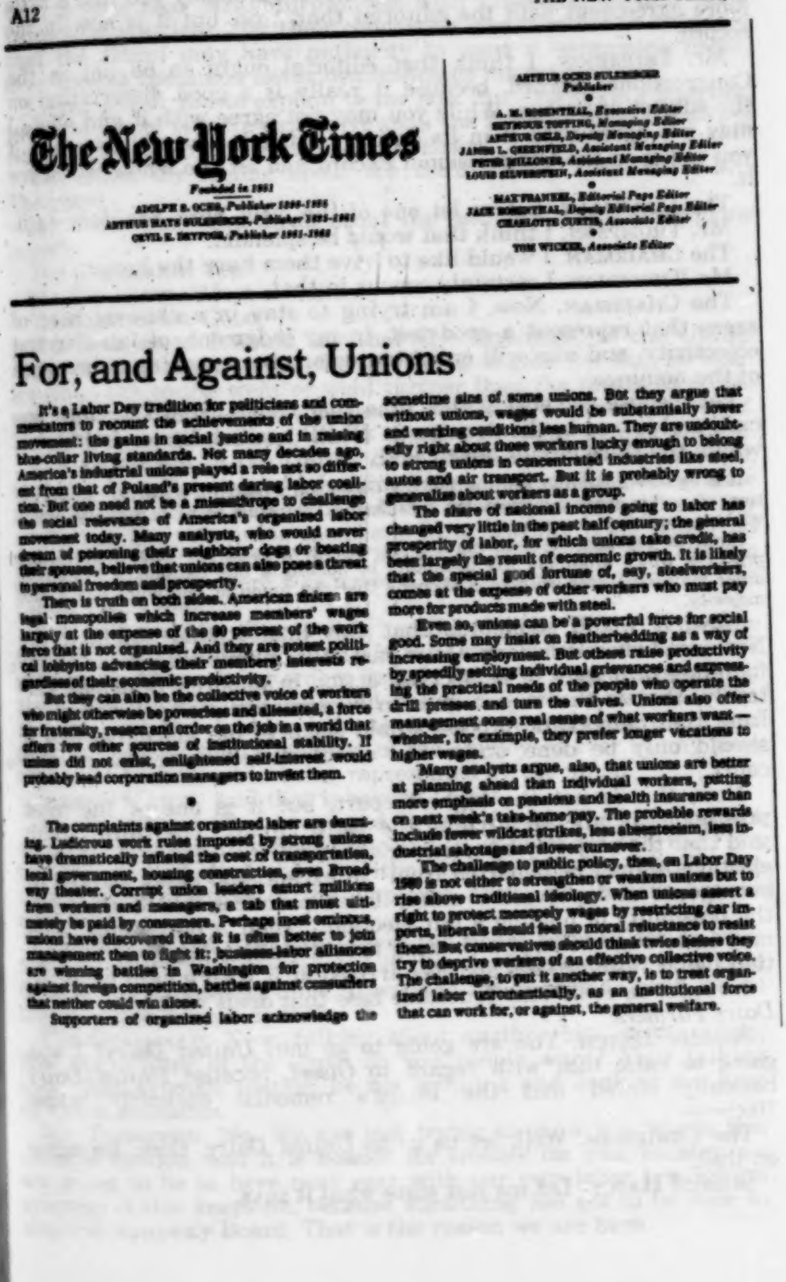
> can also be the voice of workers who might otherwise be powerless and alienated, a force for fraternity, reason and order on a job in a world that offers few other sources of institutional stability. If unions did not exist, enlightened self-interest would probably lead corporation managers to invent them.

Mr. **Thompson**. I thought you would read that.

The **Chairman**. The whole thing will be in the record.

[The article referred to follows:]

Monday, Sept. 1, 1980



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THE NEW YORK TIMES, M

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For, and Against, Unions

It's a Labor Day tradition for politicians and commentators to recount the achievements of the union movement: the gains in social justice and in raising blue-collar living standards. Not many decades ago, America's industrial unions played a role not so different from that of Poland's present daring labor coalition. But one need not be a misanthrope to challenge the social relevance of America's organized labor movement today. Many analysts, who would never dream of poisoning their neighbors' dogs or beating their spouses, believe that unions can also pose a threat to personal freedom and prosperity.

There is truth on both sides. American unions are legal monopolies which increase members' wages largely at the expense of the 80 percent of the work force that is not organized. And they are potent political lobbyists advancing their members' interests regardless of their economic productivity.

But they can also be the collective voice of workers who might otherwise be powerless and alienated, a force for fraternity, reason and order on the job in a world that offers few other sources of institutional stability. If unions did not exist, enlightened self-interest would probably lead corporation managers to invent them.

•

The complaints against organized labor are daunting. Ludicrous work rules imposed by strong unions have dramatically inflated the cost of transportation, local government, housing construction, even Broadway theater. Corrupt union leaders extort millions from workers and managers, a tab that must ultimately be paid by consumers. Perhaps most ominous, unions have discovered that it is often better to join management than to fight it: business-labor alliances are winning battles in Washington for protection against foreign competition, battles against consumers that neither could win alone.

Supporters of organized labor acknowledge the sometime sins of some unions. But they argue that without unions, wages would be substantially lower and working conditions less human. They are undoubtedly right about those workers lucky enough to belong to strong unions in concentrated industries like steel, autos and air transport. But it is probably wrong to generalize about workers as a group.

The share of national income going to labor has changed very little in the past half century; the general prosperity of labor, for which unions take credit, has been largely the result of economic growth. It is likely that the special good fortune of, say, steelworkers, comes at the expense of other workers who must pay more for products made with steel.

Even so, unions can be a powerful force for social good. Some may insist on featherbedding as a way of increasing employment. But others raise productivity by speedily settling individual grievances and expressing the practical needs of the people who operate the drill presses and turn the valves. Unions also offer management some real sense of what workers want — whether, for example, they prefer longer vacations to higher wages.

Many analysts argue, also, that unions are better at planning ahead than individual workers, putting more emphasis on pensions and health insurance than on next week's take-home pay. The probable rewards include fewer wildcat strikes, less absenteeism, less industrial sabotage and slower turnover.

The challenge to public policy, then, on Labor Day 1980 is not either to strengthen or weaken unions but to rise above traditional ideology. When unions assert a right to protect monopoly wages by restricting car imports, liberals should feel no moral reluctance to resist them. But conservatives should think twice before they try to deprive workers of an effective collective voice. The challenge, to put it another way, is to treat organized labor unromantically, as an institutional force that can work for, or against, the general welfare.

Mr. Thompson. I thought that once you saw that, you would read it.

The Chairman. I think that, on balance, they find a little more to worry about with unions than I do, and probably you find a little more agreement with the editorial than I do, but it is now in the record.

Mr. Thompson. I think that editorial ought to be put in the Congressional Record, because it really is a good dissertation on the subject of unions. While you may not agree with it and while I may not agree with it in its entirety, I think it would be grand if you put it in the Congressional Record and let the whole world see it.

The Chairman. Let us let one of the New York Senators do it.

Mr. Thompson. I think that would be splendid.

The Chairman. I would like to have them have the honor.

Mr. Thompson. I certainly concur in that.

The Chairman. Now, I am trying to stay in a channel here of areas that represent a good test, in my judgment, of fairness and objectivity, and also will enlighten us on the reasoning approaches of the nominee.

Let me use something this time that comes from the third circuit, and it was in the decision in NLRB against Armco Industries, where the third circuit bench said:

> It is by now a familiar refrain that the *Gissel* court posted a tripartite categorization of unfair labor practices for considering the issuance of bargaining orders without requiring elections.
>
> First, in exceptional cases marked by outrageous and pervasive unfair labor practices which eliminate the possibility of holding a fair election, a bargaining order may issue even without a showing that the union at one point had a card majority.

Now, it would strike me that this institutional stability, the National Labor Relations Act is part of it, is founded on one of our founding principles of democratic action in majority decisions; certainly, that is the way it goes in representation. To break away from that democratic process would seem to me alarming, and it should only be done under the circumstance described by this court.

Now, this is not the highest court, but it is one of the most prestigious of all the circuits, the third circuit. The third circuit said that the majority situation or the majority opinion on cards in elections should be departed from "in exceptional cases marked by outrageous and pervasive unfair labor practices which eliminate the possibility of holding a fair election." Then, a bargaining order may issue even without a showing that the union has gone through that democratic process and has arrived at it with a card majority.

Now, let us come to a Truesdale case that deals with this, *United Dairy Farmers.*

Senator Hatch. You are going to go into *United Dairy*? I was going to raise that with regard to *Gissel,* because *United Dairy* basically stated that the Board's remedial authority under 10(c)——

The Chairman. Well, let us go to *United Dairy,* then; we agree on that.

Senator Hatch. Let me just state what it says.

The **Chairman.** In *United Dairy Farmers,* Mr. Truesdale, along with—because of the record that has been made here, it is important to note that Mrs. Murphy was with Truesdale on this—took pains to make clear that their conclusion was "limited to a finding that the Board may have authority to issue a bargaining order, even though the union never demonstrated majority status."

I want to ask you to explain to me how Mr. Truesdale's interpretation of *Gissel* is more expansive than the Federal court's. I would suggest that, if anything, it is less expansive.

You share my feeling about the third circuit, I am sure, Mr. Thompson.

Mr. **Thompson.** You mean about the fact that it is a prestigious court?

The **Chairman.** Yes.

Mr. **Thompson.** Most certainly.

The **Chairman.** Good.

Mr. **Thompson.** I would say that Mr. Truesdale, in the *United Dairy Farmers* case, was on the side of the angels; not that he went less than the courts went or went further than the courts went. He and Mrs. Murphy decided this case, I would say, in line with *Gissel.* Now, I do not like *Gissel,* but I think they were in line with it.

It is significant in the *United Dairy Farmers Co-op* case, though, that members Fanning and Jenkins both said that they would issue a bargaining order instead of holding another election; now, they are two of the remaining members. Mrs. Murphy is no longer on the Board; Mr. Truesdale is no longer on the Board. Mr. Penello dissented, because there was never a majority card-showing in this *United Dairy* case.

But we have Mr. Zimmerman on Board now. If Mr. Truesdale returns, you will probably find *United Dairy Farmers* reversed and you will find bargaining orders issued. This was what I was talking about a while ago; you will find bargaining orders issued, if Mr. Fanning and Mr. Jenkins have their way, even though there was never a showing that a majority of the employees ever at any time expressed an interest in being represented by the union.

Senator **Hatch.** And that is beyond *Gissel.*

Mr. **Thompson.** That even goes beyond *Gissel.* That is a perfect example of where this Board is going. It is what we call the "but for" theory and what they call the "but for" theory; but for the unfair labor practices of the employer, there would have been a majority.

It is like the old steel case where the Board tried to decide what the parties would have decided if they had been dealing in good faith at the bargaining table. It went to the Supreme Court, where they said you cannot do that.

The **Chairman.** Now, talking about another bite at the apple, how many bites of the apple do you people want? Your talking about Zimmerman; neither he nor Fanning and Jenkins are here on this nomination.

Mr. **Thompson.** No. We are just trying to show you where this thing is headed, and it is headed for trouble for you, because we are going to be in here next year with our own labor law reform program if this keeps on, because something has got to be done to stop this runaway Board. That is the reason we are here.

I did not come here to personally attack John Truesdale. As I have told you repeatedly, he is a fine fellow; I like him and I have known him a long time. I introduced him as a speaker several times around the country. I used to call him the Betty Crocker of the Labor Board, because he was the executive secretary and every-time you turned around, his name was on something; there had to be 10 of him.

But that is beside the point. The point is that we have to stop this runaway Board now, or else you are going to have a legislative fight that will make labor law reform look like child's play, and it will not be beyond next year, because that is where we are headed.

If they keep changing this law and if they keep ramming these things down our throats, two things are going to happen, I predict, and I do not say this with any vindictiveness or any of the kind of threats that some of these union folks make. I understand Mr. Kirkland was going to come over and make a few of them to us today, but he decided against it, in what I think was probably a wise decision on his part. I wish he had come.

The **Chairman**. No, no; he asked for another day.

Mr. **Thompson**. Well, I hope you will give it to him.

The **Chairman**. I do not know if we will or not.

Senator **Hatch**. I would like to hear what he has to say.

Mr. **Thompson**. I hope he will come.

The **Chairman**. His statement is going to be part of the record.

Mr. **Thompson**. I think that if Mr. Kirkland comes, it will illustrate beyond anything we could say how important the labor movement looks on this nomination, not because Mr. Truesdale means anything to them—I have heard them criticize him too—but because they know that if they get Mr. Truesdale back on this Board, they have this Board locked in for the next 3 or 4 years unless we can pass some legislation. That is what this is really all about.

I am not making jokes and I am not making threats, but two things are going to happen.

The **Chairman**. I have been here on this committee for 22 years, and as far as I can recall, not once has labor advanced anybody from labor for any of these important positions under the National Labor Relations Act, for the Board or for the General Council.

Mr. **Thompson**. Well, they do not have to; they just reach down into the Labor Board and pull somebody out. That is where they all come from.

The **Chairman**. That is my whole point.

Mr. **Thompson**. They reach down into the bureaucracy itself and pull one of their guys out that has been there all his life and put him on the Board.

Senator **Hatch**. Do you not think that the President of the United States has some say in these matters? I mean, how incredulous can you be? Let us face it; they know exactly what is going on here. There is not any question in anybody's mind about that.

The **Chairman**. There have been people from management. My point is that there has never been a nominee advanced from labor.

Mr. **Thompson**. We do not have that many people in the bureaucracy.

The **Chairman**. Meany made it a principle; he would prefer nobody out of labor organizations to be in these positions.

Mr. COLEMAN. Well, Senator, I think the reason for that is that hey survey people on the Labor Board now whose decided opinions un favorable to their point of view, and they have a track record. he safest thing for them to do is to select one of those people who as already gone on Board as supporting organized labor's positions on all of these issues. They are not required to report anybody from their own ranks.

The CHAIRMAN. They have as much disagreement with Mr. Truesdale as you do.

Mr. COLEMAN. I doubt that, Senator. They may disagree with one or two of his decisions, but I am sure they support the overall trend of his approaches to these cases.

Mr. THOMPSON. I do not think Mr. Kirkland was coming here to oppose him.

The CHAIRMAN. They disagreed with *United Dairy,* the one we started talking about here.

Senator HATCH. Does Mr. Kirkland's letter show that they have as much disagreement with Mr. Truesdale as these fellows do?

The CHAIRMAN. He would not put it that way.

Senator HATCH. I would not think so.

The CHAIRMAN. I was the one who raised that.

Senator HATCH. I see.

Mr. THOMPSON. I was not under the impression that Mr. Kirkland was coming here to oppose Mr. Truesdale's nomination. If that is true, I would surely like to know it.

Senator HATCH. I would like to have him testify.

Mr. THOMPSON. We may have to reappraise our position. [Laughter.]

You ought to listen, Senator Williams. I get off some pretty good lines now and then; you ought to listen. [Laughter.]

The CHAIRMAN. I missed that.

Mr. THOMPSON. I said I was not under the impression that Mr. Kirkland was coming here to oppose Mr. Truesdale's nomination. If he is indeed coming here to oppose Mr. Truesdale's nomination, we may have to reconsider our position.

The CHAIRMAN. Now, if I were cynical, I know what I would say. [Laughter.]

Mr. THOMPSON. I invite you to say it.

The CHAIRMAN. Now, let me just state what I believe is the situation. In the entire 45-year history of the Board, there has never been a bargaining order issued absent some showing of majority status by the union. Indeed, in *United Dairy* itself, despite a finding that the employer's unfair labor practices were outrageous and pervasive, Mr. Truesdale refused to issue a bargaining order and apply any remedy not commensurate with the principle of majority rule.

I simply do not see how anybody could claim that his handling of that case indicates lack of concern for majority rule.

Mr. COLEMAN. But, Senator, he left open the possibility that in another case, he would go along with that idea of not allowing a free election.

The CHAIRMAN. All he did was what a Board member would be well advised to do—look to the appellate authority to see what they said. He applied *Gissel.*

Mr. **Thompson**. Now, we saw, in the Spielberg line of cases, Mr. Truesdale change his position at least once.

The **Chairman**. On which?

Mr. **Thompson**. The Spielberg line of cases; that is your arbitration deferral line of cases. He changed his position at least once, and maybe twice, in my view; perhaps it would not be so in his view.

If he changes his position in this case—nobody has said that he took Jenkins' and Fannings' position that they should have issued a certification—if he changes his position here, that will be the law, at least until it gets back to the third circuit or whatever circuit gets its hands on it.

I hope that they throw the book at them if they go for that "but for" theory. They have been pushing that theory as long as I can remember, and that is a long time. I think that when he resumes the stand, somebody ought to really pin him down on this one.

The **Chairman**. All right.

Mr. **Thompson**. If he is going to change his position on that one, then you really will have a change in the *Gissel* rule.

The **Chairman**. You can have the last word here today, and we are going to see whether he is still with *Gissel*.

Mr. **Thompson**. I hope you will ask him that, and if he is going to stay with *Gissel* after you confirm him, because that is a very important thing to us. I will not say that you should confirm him if he says he will, but I would like to know; I would like this record to show it.

The **Chairman**. Well, I hope my questioning will be appropriate and his reply will be responsive. Certainly, we can get from the nominee his position on the principle.

Mr. **Thompson**. I want to be sure that I make myself clear to you. I am not suggesting anything other than this: The *Gissel* line of cases is a major line of cases in labor law, as I am sure you know. The treatment of that *Gissel* decision by the Labor Board has been very, very carefully watched by everyone in the labor field.

The **Chairman**. That is why I said that these are the things we ought to be looking at at this hearing.

Mr. **Thompson**. That is right.

The **Chairman**. This is important.

Mr. **Thompson**. The way the Labor Board treats the *Gissel* case is a perfect study in and of itself of how the Labor Board makes policy and how one appointment to that Board can change that policy, because you have already got two dissents out of the four people who are now on that Board, and one of the four has not gone on record on this point.

This is a perfect example of how you are not just talking about a simple appointment to another agency or a simple appointment to an advisory committee, or even an appointment to the bench. You are talking about an appointment to a Board which makes labor policy for the United States of America, and it goes beyond just interpreting. In the interpretation of Supreme Court cases and in the interpretation of the statute itself, they make policy.

When you pack that Board and when you deliberately throw that Board out of balance, you are going to not only change the labor policy of the United States without the benefit of legislation, but you are going to change the balances that are there and do harm to the entire labor-management relationship in this country. That is the reason we are here and that is the reason we are so concerned.

The CHAIRMAN. Well, I tell you, you have a lot of anxieties, and it escapes me. Let us take *Gissel.* Every Federal court that has had this before it has come up with the same conclusion and finding in the area of *Gissel.* I mean, it is not as though this Board could jump the tracks and go off into a legislative world without any of our processes coming to apply.

But, now, I want to go back to United Dairy, if I could.

Senator HATCH. Well, before you leave *Gissel,* is it not the point that the Board should be obligated to follow the court's decision?

The CHAIRMAN. Exactly.

Senator HATCH. They are indicating that they are going to go beyond the court's decision.

The CHAIRMAN. He is afraid they are.

Senator HATCH. That is what the opinion says.

Mr. THOMPSON. Fanning and Jenkins said they would have gone beyond *Gissel* in this case.

Senator HATCH. And he says they may have to go beyond it.

Mr. THOMPSON. They just need one more vote.

The CHAIRMAN. We have one nominee before us, and let us get it right from him.

Mr. THOMPSON. I think that would be splendid.

The CHAIRMAN. All right. The *United Dairy* case certainly is a crucial one, again, in my judgment, in evaluating Mr. Truesdale's performance. I am concerned, though, that we not examine this case apart from its underlying factual situation.

United Dairy was specifically found by the administrative law judge to have unilaterally changed the status of its employees—they were truck drivers—to that of independent contractors, solely to halt a unionization drive and avoid coverage of the act.

They also discharged a number of employees, engaged in coercive interrogations, and gave bonuses to employees as a means of blunting the union drive. In the face of that kind of activity, the administrative law judge observed that, "To that company, the Board's conventional remedies are a mockery."

Now, despite all of that, Mr. Truesdale refused to enter a bargaining order. I have a feeling of appreciation for the reasoning behind his refusal. I want to suggest to you, though, that if the Board is to refrain from ever entering bargaining orders for minority unions, it must have at its disposal strong remedies to deal with this sort of really outrageous misconduct—remedies such as the freedom of access granted in Florida Steel.

To get the impression of what I am trying to say here in this whole area, Mr. Thompson, that case—you know, I am not a labor lawyer, but as I read——

Mr. THOMPSON. You do pretty well.

The CHAIRMAN. As you read all of the elements that were found as factual bases by the administrative law judge, this is what the objectives of the orderly processes of the National Labor Relations

Act are. If there is any case that would seem to suggest an effective remedy, there it is.

I would say Mr. Truesdale's situation was, from your standpoint, soundly conservative in that case.

Mr. THOMPSON. I would say it was just a proper interpretation of the law, as the Supreme Court has elaborated it. It seems to me that it is rather strange when you have to applaud a judge because he followed something the Supreme Court told him he had to do. It is these other two people, Fanning and Jenkins, that ought to be called to task for suggesting that they should go beyond the Supreme Court decision and make new law, which the Supreme Court, I think, said they could not do. I think Truesdale is suggesting that he might go along with them next time in this case.

Senator HATCH. Let us not ignore the language. The Board's remedial authority under 10(c) of the act "may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support."

The CHAIRMAN. Is that not what the Supreme Court gave as the law of the land?

Mr. THOMPSON. No.

Senator HATCH. No.

The CHAIRMAN. What did they say?

Mr. THOMPSON. I read *Gissel* to say that in an extreme situation where you have got extreme, unfair labor practices and where you have a majority of the employees who had at least signed cards and indicated a desire to be represented by the union, then the Board, as an extraordinary remedy, could certify the union.

Senator HATCH. This case says "may be able to do it without a majority."

Mr. COLEMAN. That is correct; that is the troubling factor.

The CHAIRMAN. We are going to have to straighten this out. Are we going to be able to get that *Gissel* case here, because I do not think it says what you say it says?

Mr. THOMPSON. You said that there has never been a case where a union has been certified when they had no majority status; I heard you say that a few minutes ago.

The CHAIRMAN. No.

Mr. THOMPSON. *Gissel* did not suggest that unions should be certified when they did not have a majority status. The distinction between these two cases, *Gissel* and *United Dairy Farmers*, is that in *United Dairy Farmers* the administrative law judge and two of the present sitting members of the Labor Board suggested that the union should be certified as a remedy to the unfair labor practices without another election, without a showing of a majority interest on the part of the union by cards, and simply holding that because of these unfair labor practices, the employees ought to have a union anyway.

Senator HATCH. That is right. In the *Gissel* case, the Board found that the union had obtained valid authorization cards from a majority of the employees in the unit.

Mr. THOMPSON. Right.

Senator HATCH. And there was no such evidence of majority support in *United Dairy*.

Mr. THOMPSON. That is right.

Senator HATCH. That is the difference, and it is not an insignificant difference; it is a big issue here, when the Supreme Court, in *Gissel*, basically said what you have said it said.

Mr. THOMPSON. It is one of the biggest issues in the labor field right now, and this Board is perched and ready to go.

Senator HATCH. Basically, what you are talking about is denying the employees the fundamental right to choose whether or not they will be unionized; it still comes down to that issue.

Mr. THOMPSON. It is contrary to everything this act is supposed to do.

The CHAIRMAN. I wanted to stay in a channel; we are in it and it is a clear channel to a decision here. You make it one of the most important areas in labor law right now?

Mr. THOMPSON. That is right.

The CHAIRMAN. All right. We do have other witnesses.

Senator HATCH. I have other questions. I really want to go through these cases; I will try to do it in as expedited a way as I can. I think the time has been about equally divided this morning.

The CHAIRMAN. Yes, it has been; there is no complaint there.

Senator HATCH. I do not have any complaints. This is an important area and I do not think we can make our case that it is as essential as we think it is without going through some of these cases.

The CHAIRMAN. How about platooning here? You are going to be here, anyway, I know.

Mr. THOMPSON. I am going to be here as long as you want me to be here.

Senator HATCH. Well, this is their second day back. Why do we not just finish with this panel so that they can leave?

The CHAIRMAN. Let us platoon and bring on Professor Goldberg, and then come back to this.

Senator HATCH. Why do we not let Professor Goldberg come up and sit; maybe we can give him this seat here and give him a mike and he can comment on any of these things that he would care to comment on.

The CHAIRMAN. Well, let us go with the regular order here.

Senator HATCH. Well, let us do the regular order. These fellows have come back twice now at great expense to themselves.

The CHAIRMAN. So has Professor Goldberg.

Senator HATCH. Has he?

The CHAIRMAN. Yes; this is his second time.

Senator HATCH. I did not know that. Well, in any event, I think we ought to finish with them; then Professor Goldberg can give his testimony and answer any questions we may have for him. Let me try and get through here.

The CHAIRMAN. Let me have an estimate of time here.

Senator HATCH. What I do not want to do is I do not want to fail to go through what I need to go through here today by having it hacked up in the record so that nobody understands what we are trying to do and what we are trying to bring out in what really is an important discussion on labor law.

The CHAIRMAN. It is important. Give me an estimate of time.

Senator HATCH. I have no idea, because it has taken us about 2½ hours to get through only two or three major cases here, and I have a whole bunch of other cases that just have to be gone through.

The CHAIRMAN. We did hit the critical cases; this last one is very critical.

Senator HATCH. Those are critical, but I have a lot of others that are critical.

Mr. THOMPSON. There are lots of others.

Senator HATCH. I will tell the chairman that I will do it in as expedited a way as I can, and if we can shorten the answers, I would appreciate that as well. I do not want to foreclose you from saying whatever you want to say, but I do think it is important to go through these matters and to show a pattern here that has occurred. So if I could proceed, Mr. Chairman, I will.

In Woelke versus Romero—it is 239 NLRB No. 43–this was overruled by the Ninth Circuit Court of Appeals in 1979 at 609 F.2d 1341. The Board interpreted the construction industry proviso contained in section 8(e) of the act. The union signatory clause, found to be secondary in nature, was found by the Board to be nonetheless protected under this construction industry proviso.

Now, do the chamber and NAM agree that special problems in the construction industry warrant special treatment?

Mr. THOMPSON. My feeling on behalf of the chamber would be that while the construction industry has been treated differently in some areas of labor law, this case goes beyond the treatment that is warranted. This is what we look on as sort of organizing from the top down, and I think that is the ultimate result of this case and this line of cases. It goes beyond what we think Congress intended in setting up these sections of the law for the construction industry.

Senator HATCH. Do you agree?

Mr. COLEMAN. I would subscribe to that.

Senator HATCH. In E. L. Wigand Division, the Emerson Electric Co. case, 246 NLRB No. 162, a Board majority of Fanning and Truesdale held that an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits.

Would you comment on this decision and the status of the law prior thereto?

Mr. COLEMAN. Well, Senator, this is a complete change from past Board precedent where, if an employee was on sick leave at the time that a strike occurred, there had to be some affirmative showing by him that he was not joining in the strike but was ready and willing to return to work but for his injury or disabling problem.

The Board, for what we can see as no apparent reason, has done a complete flip-flop in this area and now has required the employer to show that the employee has somehow alined himself with the strikers. In other words, they have shifted the entire burden of proof from the employee to show that he is ready, willing and able to return to work, to the employer to show that he is not, and the employer does not have, within himself, the ability to make that determination.

As a result, what you have here is the potential for a number of employees who, in fact, are joining in and supporting a strike to receive disability payments while that strike is going on, even though they are ready and willing to return to work, but for the strike. In effect, what the Board is doing is requiring an employer to financially support a strike on the part of employees who otherwise would be ready, willing and able to return to work.

This is a complete reversal of a Board precedent of many years in this area, with no prior notice to the employer that was involved that the Board is even changing its position in this area.

Mr. Thompson. The result of this case, as I read it, is that it enables disabled workers to participate in a strike and continue to draw disability pay as well, and it shifts the burden from the employee to the employer to determine whether that employee is participating in a strike or whether he is simply out because he is disabled—a rather peculiar interpretation of the law and a total departure from past precedent.

Mr. Truesdale joined with Chairman Fanning in this decision, with a dissent, in part, by Mr. Jenkins and a dissent in full by Mr. Penello.

Senator Hatch. In Gaylord Broadcasting Co., which is 250 NLRB No. 58, and this was decided on June 26, 1980, a decertification petition was filed by employees prior to formal signing of the collective bargaining agreement. Because the decertification petition had been filed, the employer refused to sign a formal agreement.

A Board majority of Fanning and Truesdale held that the initial agreement constituted a signed contract covering substantial terms and conditions of employment, thereby barring the decertification petition. In so holding, the majority ignored the precedential Bright Line rule, which requires that a contract be fully executed, signed and dated before it raises a bar to an election petition.

Now, would you explain the Chamber's and NAM's position regarding this decision? It seems to be a startling decision to me.

Mr. Coleman. Senator, again, this is another illustration of how some of these recent Board decisions have denied employee rights.

Senator Hatch. These are not all that hurtful to employers, but they certainly hit the employees right between the eyes.

Mr. Coleman. Well, that is right. This was a case where the employees were disenchanted with the union representation and wanted to have a vote to determine whether that union should continue to represent them or not.

The Board came up with a new wrinkle on their contract bar doctrine to deny these employees the right to get this election. The Board in the past had held that it had only been a bar to an election where you had a signed contract that was fully executed and all of the parts in the contract were complete.

Senator Hatch. In this case, they were not complete?

Mr. Coleman. In this case, they were not complete at all. There had been no signed contract; the pages had been initialled. In fact, as time went on, the parties kept making changes to this agreement, so that there was no complete, finished contract that could serve as a bar to an election.

Here, the net effect of the Board's reversing their policy as far as the contract bar and opening up this new exception was to deny these employees the right to have an election and they continued to be saddled with this union that they did not want for at least another year.

In fact, Senator, in this case the followup was that these employees were denied an election for the entire year until the contract that the Board deemed was a contract finally expired, and then those employees filed a new petition and tried to get an election a second time.

Really, what the net effect of this is is to deny these employees the right for well over 1 year for an election as to whether they want this union to continue to represent them or not.

Senator HATCH. And the denial occurred not even on a good technicality.

Mr. COLEMAN. That is right.

Mr. THOMPSON. It could deny them for up to 3 years under present Board rules, because that initial document could have been a 3-year document and you could have foreclosed decertification for a period of 3 years.

The important thing here is that this is another example, and this case is dated June 26, 1980——

Senator HATCH. This is this year, just a couple of months ago.

Mr. THOMPSON. Yes, sir. Mr. Truesdale joined Chairman Fanning in overruling an established Board precedent, the Board precedent being the Bright Line rule. Member Penello filed a very strong dissent in the case because of the departure. It is a sharp change in Board policy in which Mr. Truesdale and Mr. Fanning participated.

Senator HATCH. Explain exactly what the Bright Line rule is.

Mr. THOMPSON. Well, the Bright Line rule is that a decertification petition will hold or will stand unless there is a signed, executed agreement; it will not be barred by a tentative agreement under the precedential Appalachian Shale Bright Line rule.

In other words, unless that agreement is fully executed, the agreement itself will not bar a decertification petition. If it is fully executed under the Bright Line——

Senator HATCH. Was the Bright Line rule established through courts of law or through NLRB precedent?

Mr. THOMPSON. I think it has full court sanction; I am not certain of that, but it is a well-established principle that has been changed.

Senator HATCH. Well, it is a departure from the well-established Board principle, and may be a departure from court principle.

Mr. THOMPSON. That is right.

Senator HATCH. In National Transportation Service, Inc., at 240 NLRB No. 97, a Board majority of Fanning, Jenkins, and Truesdale disavowed adherence to the "intimate connection" test previously utilized by the Board in deciding whether to assert jurisdiction over an employer with ties to an exempt entity.

The majority found that this company, which provides daily school bus transportation for public school systems in Atlanta, Ga., does not share in the exemption granted to Government employees.

Now, Mr. Coleman, could you provide the NAM's position with respect to this assertion of jurisdiction by the Board? Of course, Mr. Thompson, you may comment also.

Mr. COLEMAN. Well, this is again another illustration, in our point of view, of the Board reaching out to constantly expand its jurisdiction. In this particular case, the employer was intimately affected by Government regulations and much of their labor relations policy had to conform to State government regulations in this area.

Traditionally, where the private employer does not independently run its labor relations, but rather has to conform to Government regulations, this is considered to enmesh the private employer with the Federal Government to the extent that their activities would be excluded under the National Labor Relations Act and would not be subject to their jurisdiction.

Again, in our estimation, this is another illustration of where the Board just disregarded prior decisions in this area, in an effort to constantly expand its own jurisdiction into this area.

Mr. THOMPSON. This case is another sharp departure from established Board precedent, and it also is another example of how the Board has seen fit to expand its jurisdiction by simply reaching out and grabbing another segment.

What they did here is they changed the rule that applies to businesses that are intimately connected with governmental operations. In this case, it was the school system in Atlanta, Ga. The employer provided a school bus service; under the old rule, that would have been exempt because that was intimately connected to the operations of the school.

Under the new rule, which is a rather strange rule, I think, the proper inquiry—and I am reading this—"the proper inquiry under the new rule is to determine whether the employer itself meets the definition of 'employer' in section 22 of the act, and if so, determine whether the employer has sufficient control over employment conditions of its employees to enable it to bargain with a labor organization as their representatives."

In other words, they have just completely ignored the fact that this is an intimate part of a governmental operation. Under the statute, as you know, governmental operations are excluded.

Senator HATCH. And under prior precedent.

Mr. THOMPSON. And under all prior precedent of the Board, they would have been excluded in this case. This was Fanning, Jenkins, and Truesdale, with dissents by Murphy and Penello.

Senator HATCH. If they can do this with Murphy and Penello on the Board, you can imagine what they can do with four to one on the Board.

Mr. THOMPSON. That is right.

Senator HATCH. In Painters Local 452, Henry C. Beck Co., 246 NLRB No. 148, the issue presented was whether the union violated section 8(g) of the act by picketing at two reserve gates at the premises of a construction site at which there are two health care institutions without first providing a 10-day notice of intent to picket required by section 8(g).

The majority in which Mr. Truesdale participated held that section 8(g) does not require a union to provide notice of its intention to engage in concerted activity against an employer which is not a health care institution, simply because the activity is to take place at the health care facility.

The applicable precedent expressed in Lean-Steinberg, 219 NLRB 837, was overruled. This precedent had held that section 8(g) proscribes any strike or picketing at a health care institution.

Mr. Thompson, would you care to comment on this decision?

Mr. Thompson. Of course, Lean-Steinberg was the precedent which was overruled. In this instance, the majority was made up of Fanning, Jenkins, Truesdale, and Murphy, with Penello dissenting. Member Murphy filed a concurring opinion in which she said that she thought that these rules ought to apply only at the health care institution.

It is another departure from Board precedent; it is another extension of Board activity, or separation of health care institutions from the construction type work that goes along with them. We think it is a clearly erroneous decision, but aside from that, it is a policy decision that has been made by this particular Board, Fanning, Jenkins, and Truesdale being the controlling votes in the case.

Mr. Coleman. We also think, Senator, that it goes against congressional intent to immunize hospitals from these types of labor disputes and to give the hospitals some type of protection from strikes that have plagued private industry generally.

I think this decision completely illustrates how the Board ignored congressional intent and the language of the statute to expand union rights to picket and strike.

Mr. Thompson. As you recall, when we were testifying on the bill which extended coverage to health care institutions which previously had exemptions, this was a great concern of the Congress.

Senator Hatch. And it was fully debated in Congress that they need to have this 10-day rule in effect with regard to nonprofit health care institutions.

Mr. Thompson. This section was put into the law to protect health care institutions from the disruptions of labor disputes as best you could do it, and this is a definite eroding of that effort by Congress.

Senator Hatch. This, as I recall, occurred in 1974 during the nonprofit hospital amendments to the National Labor Relations Act, and there was full and free debate on the floor indicating that this 10-day rule was supposed to be observed with regard to nonprofit hospitals.

Mr. Thompson. That is correct.

Senator Hatch. You can correct me if I am wrong, but that was also the amendment process where they put in the religious freedom amendments for hospital employees. Am I correct on that?

Mr. Coleman. That is correct. There is an exemption that hospital employees are not required to join a labor union on religious grounds.

Senator Hatch. Of course, we are trying to get that exemption for all employees who have religious convictions against belonging to a labor union or, I guess in the alternative, those who have religious convictions requiring belonging to a labor union. I do not know of any religions that have that, but we have worked hard to get that and hopefully we will have that in the next year or so.

Mr. Coleman, you have indicated that in Clear Haven Nursing, 236 NLRB 853, a Board majority of members Fanning, Jenkins, and Truesdale rejected a voluntary settlement agreement which had been approved by the administrative law judge and accepted by the employees by a vote of 60 to 14.

Approximately 7 months after the initial decision, the Board denied the parties' joint motion for reconsideration for untimeliness. The majority in which Mr. Truesdale participated also denied the motion of the chamber of commerce to come into the case as amicus curiae.

Could you elaborate on the NAM's position with regard to the Board's rejection of these settlement agreements?

Mr. Coleman. Well, Senator, I think this ties in basically with some of the criticisms that we have leveled with respect to the *Suburban Freight* case. It is a failure on the part of the Board to defer to more appropriate forums for settling labor-management disputes on a voluntary basis.

In *Suburban Freight,* as we discussed, we saw in that case the Board showing a reluctance to defer to the forum that the parties voluntarily chose in their collective bargaining agreement to resolve these disputes.

Senator Hatch. Again, these were employees making these decisions—60 to 14, an overwhelming vote.

Mr. Coleman. That is right. And then in the *Clear Haven* case, the union and the company had worked out a settlement arrangement of this unfair labor practice charge and the employees, as you pointed out, accepted this settlement by a vote of 60 to 14. The employees were happy; the union was happy; the employer was happy, and all the parties joined in this type of an agreement. Yet, for some reason or another, the Board was not satisfied and they required all the parties to go through the expense of an unfair labor practice proceeding. I venture to say that when the parties eventually got down to bargaining, probably a year or two later, they came up with exactly the same type of settlement agreement that they had reached at the Board unfair labor practice proceeding.

So what you have is a proliferation of administrative proceedings mandated by the Board, when the parties, who are the ones that should be our main concern, were happy, and by "parties," I am including the 74 employees that had an opportunity to vote on the settlement agreement.

Senator Hatch. And the employer and the union?

Mr. Coleman. That is right. Everybody was happy, except that the Board apparently wanted more work in this case.

Senator Hatch. It makes your point that they are unnecessarily clogging up the Board by asserting jurisdiction in areas that they have not been in the past.

Mr. Coleman. Well, we have a case right now, Senator, the same type of thing where the union and the company have agreed to a settlement provision that takes into account back pay of employees. Yet, the regional director, based on decisions like this *Clear Haven* decision, does not want to defer to the parties that the statute regulates.

In other words, if the employer and the employees and the union are all happy and feel that it is a fair settlement, who is the Board to question otherwise? The Board apparently does not feel that way. The Board apparently wants to have a life of its own and has refused to release these cases, just as we have seen in the Suburban Freight line of cases.

Senator Hatch. How does this harmonize with the Board's duty to peacefully resolve these cases?

Mr. Coleman. Well, you would think that the overriding policy would be to try and resolve these disputes and problems on a harmonious and satisfactory basis so that there will not be strikes and disruptions, and so on.

Being the cynic that I am, Mr. Chairman, I view this particular case—this is the *Clear Haven* case we are talking about now—I view this case as the Board saying that "If the general counsel does not go along with the settlement, then we are going to stick by him." It is significant, I think, that the general counsel was Mr. Irving, and this was one of the instances where I disagreed with him because I think he clearly took a wrong position.

I do not know whether you heard what we said earlier before you came in. This is a case where the union, the employer, and the employees by an overwhelming vote all agreed to a settlement on a case and the general counsel would not approve it, and so they had to go to the Board. The Board, with members Fanning, Jenkins, and Truesdale in the majority, and members Murphy and Penello dissenting, agreed with the general counsel that the settlement should not be allowed to stand.

I never have quite understood this case. I just assumed that they did not want to slap down their general counsel, and so they stuck with him on it. It is a strange case; I hope it will stand out there alone, because it is certainly contrary to what appears to me to be the intention of this law, to bring about labor-management industrial peace, as well as to protect the rights of employees.

Every purpose of this act was served by what the parties did in this case, except in the instance of the general counsel and the Board, who seemed to be out there in left field somewhere.

Senator Hatch. In *Amoco Production Co.,* 239 NLRB 1195, which is again a 1979 case, the issue was presented as to whether an employer is relieved of its obligation to bargain with the union certified to represent its employees following the union's affiliation with another labor organization, if voting on the question of affiliation is limited to union members.

Again, a Board majority of Fanning, Murphy, and Truesdale held that union affiliation votes limited to union members are valid, and that an employer is not relieved of its obligation to bargain under these circumstances. Therefore, the Board permitted an affiliation to occur even though nonmembers were excluded from voting.

In his concurring opinion, member Truesdale went one step further than his colleagues in the majority and stated:

> So long as the local union has not improperly denied membership to employees, I believe that an affiliation vote is not rendered invalid simply because all employees in the bargaining unit do not vote thereon.

Now, what is the position of the chamber regarding this decision?

Mr. THOMPSON. Well, our feeling here is that this is another good example of how the Board has really denied the employees their rights, has failed to protect the employees themselves, and has favored the union over the employees. It is a situation where there was clearly a change in representation from one union to another, in effect.

The full complement of employees who are required to be represented by the certification were not given an opportunity to vote on whether they wanted to make that change. Only the members of the union itself were allowed to vote on the issue. Obviously, you could predict how that would come out.

It is a perfect example of how the Board is putting the interests of the union ahead of the interests of the employees whom it is supposed to protect. In this case, the majority was Fanning and Murphy, with Truesdale concurring, and there were dissents by Jenkins and Penello.

Mr. COLEMAN. Senator, this is a particularly troubling case because it really is an erosion of the employees' rights to vote on the question of who their legal representative is going to be. Our whole system of labor law is based on the idea of majority representation. A union can only represent employees and act as their agent if a majority of the employees in appropriate units designate them to represent them.

What happened here was we had an affiliation vote where the employees were being asked to determine whether they wanted an entirely new union to represent their rights. What the Board ended up approving was the disenfranchising of employees in that unit who were going to be represented by this union—disenfranchising them simply because they were not union members.

In this case, as I recall the facts, fewer than 50 percent of the employees in the unit that was going to be represented were union members, to begin with. In the election that occurred, fewer than 50 percent of those union members actually showed up to vote on this crucial issue. So, what you had was 25 percent of the bargaining unit making a decision for the whole 100 percent of the people, and that decision determines whether the other 75 percent of the employees were going to be represented by this union and lose their right to represent themselves individually.

In effect, what has happened is that the majority of the employees who were affected by this decision were effectively disenfranchised from voting on this crucial issue as to who was going to represent them. This is the type of decision that is extremely troublesome.

Senator HATCH. In Allegheny General Hospital, that's 239 NLRB 872, a 1978 case, the Board majority overruled sub silencio prior Board cases regarding standards for refusing to grant maintenance units in the health care industry. On appeal, the Third Circuit Court of Appeals denied the NLRB's petition for enforcement. The court of appeals issued a scathing criticism of the Board for its refusal to follow applicable law, DLR-255, November 20, 1979, stating:

> This is a most unusual circumstance in which a Federal agency has refused to apply the law announced by the Federal judiciary.

This in my opinion is but one example of several in which Board decisions are incisively criticized by the courts of appeals. How does the chamber view this lack of receptivity to NLRB decisions by the courts of appeals?

Mr. THOMPSON. Well, perhaps this is a decision in which Mr. Truesdale, along with Chairman Fanning and member Murphy, constiture a majority, member Penello dissenting, in which the Board actually refused to follow an interpretation of the law by that prestigious third circuit.

I would like to read you one paragraph from that decision which might give you an idea of how this prestigious third circuit looks at this present board, because this I think illustrates one of the points we have been trying to make to you:

> A decision by this Court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this Federal judicial circuit. Thus our judgments in Memorial Hospital and St. Vincents Hospital are binding on all inferior courts and litigants in the Third Judicial Circuit, and also on administrative agencies when they deal with matters pertaining thereto. We express no personal criticism of an independent Federal agency that refuses to accept a judicial determination of this Court. We attribute no ulterior motive to the distinguished members of the Board who have publicly, although respectfully, expressed disagreement with this Court. But the Board is not a court, nor is it equal to this Court in matters of statutory interpretation. Thus a disagreement of the NLRB with a decision of this Court is simply an academic exercise that possesses no authoritative effect.

And I consider that a rather sharp criticism of the current Board and the majority there included Mr. Truesdale. That's the prestigious third circuit speaking, Mr. Chairman.

Senator HATCH. Mr. Thompson, in the case 239 NLRB 192, the Board majority again, Fanning, Jenkins, and Truesdale, held that a union could lawfully force an employer to hire a designated steward despite the fact that the action required the layoff of another employee. What is the position of the chamber regarding the Board's giving unions the power to exert such drastic control over the employer's hiring practices and policies, and is not that an extremely important policy issue for the first time in the history of the Board?

Mr. THOMPSON. It is, Senator Hatch. In this particular case the employer is a painting subcontractor whose employees are members of a union. Their agreement provided that the union had the power to appoint job or shop stewards for the enforcement of contracts. On one occasion the union sent a steward which required sending home a union employee due to lack of work. Following this, the employer suggested that an employee already on the job site be designated steward. The union alleged that none of the employees present was qualified, and shut the job down due to the lack of a steward.

The issue was whether the appointment of stewards clause was improperly applied when the union employee was sent home after a steward was appointed, and the Board held that it was not. Their reasoning was that the clause's exercise was for the union to assure that it would have present a steward who would be disposed to enforce the trade rules and police the contract without fear of losing a regular job. The union acted for a legitimate purpose, this is what the Board held, and therefore did not violate the act.

In this case, the Board overruled a standing principle and established a new policy. In that previous case, members Fanning and Jenkins dissented, as they did in the *Dairy Farmers'* case, and then we came along in 1979 with Fanning, Jenkins, and Truesdale making up a majority which reversed the precedent and set the new policy.

Mr. COLEMAN. In that case, Senator, too, I think it's instructive, again referring to the importance of a well-reasoned dissenting opinion. In this case member Penello dissented rather strongly, and I think he pointed out some of the abuses that could be opened up by the majority's decision. And he said, in sum, the majority's decision has a very regrettable practical effect upon employees' section 7 rights to refrain from union activity:

> Whereas here a union is alleged to have violated section 8(b)(1)(a) and (2) by causing an employee to be laid off, a union apparently need merely assert that it has acted pursuant to some legitimate union objective in order to prevail on the merits. Thus the majority decision has the unfortunate practical effect of insulating a union from culpability under the act, and exposing employees to possible abuse in virtually every instance in which a union causes the layoff of an employee by applying an appointment of stewards clause.

One of the fundamental tenets of the act is that there cannot be discrimination to encourage or discourage unionization, but this type of employment of a stewards clause opens up the very door to discriminate against employees because they don't participate in union activities, they don't go to union meetings, et cetera, and gives the steward a favored position over all other employees on a job site. If that isn't designed to encourage or discourage union membership, I don't really know what is.

Senator HATCH. Mr. Thompson, 2 years ago the chamber and, I believe, all other—the chamber, the NAM, and I believe all other business groups in this country to my knowledge, strongly opposed the so-called labor law reform bill. Among the arguments raised against that legislation was the fact that it would have given labor unions the clearest-cut advantage in their organizing efforts, particularly against smaller employers.

The U.S. Senate ultimately rejected the bill, in large measure because it agreed that labor law reform would have been unfair to small business people.

The CHAIRMAN. Now, that's not the way it happened. The Senate never voted on it, Orrin. The Senate did not reject——

Senator HATCH. Well, I consider six cloture votes a lot of votes on it, to be honest with you, the most in the history of the Senate on a substantive issue so, you know, you interpret it the way you want to, I'll interpret it the way I want to, but all I know is that there was a lot of——

The CHAIRMAN. Fifty-eight, rather than sixty, wanted to come to a vote, that's all. That's all that was decided.

Senator HATCH. There were six cloture votes, and I consider those important, under our rules.

Is there anything in Mr. Truesdale's decisions, Mr. Thompson, which indicates that he is sensitive to the particular concerns of small business, and if so—you know, if not, why not?

Mr. THOMPSON. Well, I see nothing in his decisions which would indicate a sensitivity to the interests of small business. I am concerned. These lines of cases we have been discussing, and all major lines of cases decided in the last 2 or 3 years, indicate somewhat of an insensitivity to the rights of employees as opposed to the interests of unions themselves, and we all know and we all learned a great deal from that labor law reform struggle, of how much more severely some of these things come down on a small business than they do on the large corporations or the larger employers, not only on the businessmen themselves but the workers that work for those small businesses.

Senator HATCH. Some of these decisions could drastically affect small business people.

Mr. THOMPSON. These lines of cases we have been talking about, and others, have a more severe effect on small businesses and on the employees in small businesses than they do on the larger businesses, not that they don't affect the larger businesses, but that in itself I think would indicate an insensitivity to the problems of small business, and certainly it should not go without notation.

Mr. COLEMAN. I would just like to add one thing, Senator. Where this really hurts the small businessman, and we represent a number of small clients, particularly in the printing industry, 10-, 15-man, employee operations, where this really affects them is that they can no longer look to the Board for an impartial decision, and if they feel that they have to go all the way to the court of appeals to get vindication for what they've done, that is a long, time-consuming, and very expensive proposition, and many of these small businessmen simply do not have the wherewithal to fight the Federal Government in the form of the NLRB——

Senator HATCH. Almost all of them.

Mr. COLEMAN. That's right, all of the way to a court of appeals level with the briefs and the retaining of lawyers and the discovery and all of the other things that are involved. Many of these companies, rather than pursue their legal rights, ended up settling or acquiescing in a settlement with the NLRB even though from a legal standpoint they have perfectly defensible positions. And this is where it really hurts a small employer.

Mr. THOMPSON. I might point out to you, Senator, that the U.S. Chamber has approximately 100,000 corporate members. It has also several thousand trade association members, but of those 100,000 members, roughly members, 30,000 of them have 10 or fewer employees so about a third of our membership is what you would really call very small business, and we think we certainly are qualified to speak for those interests in these proceedings.

Senator HATCH. What percentage of the chamber would be bigger?

Mr. THOMPSON. Well, I think the percentage of the chamber that would be very large employers would be less than 5 percent. Most of our members are what you would classify, I think, as small business.

Senator HATCH. Well, what the law would classify as small business.

Mr. THOMPSON. Or even what the law would classify as small business, but I think the figures I just gave you illustrate how small business can be, when 30,000 of our dues-paying members, have 10 or fewer employees.

Senator HATCH. Well, is it fair to say that most of you representing various business groups in this country are alarmed at the tenor of the Board and the approach that the Board has been taking over the last 3 years?

Mr. THOMPSON. Yes, sir.

Mr. COLEMAN. We are very much so.

Mr. THOMPSON. We were also alarmed at the manner in which these nominations have been coming in the last year. There has been a very sharp departure that should be noted, I think, from the practices of previous years, at least, say, the last 10 years, and that is, there has been an effort in the previous years to find some kind of a consensus among labor and management as to sensitive appointments like Labor Board appointments. You haven't seen this kind of a controversy over appointees to the Labor Board in many a day. I think that the last time there was any real controversy was back when Chairman Miller was appointed, and the unions did voice objection to him because he was a management lawyer.

This record should show we have tried through meetings at the White House and through meetings with various interested groups, to reach some kind of an understanding or agreement on appointments to these agencies like the National Labor Relations Board.

For example, in the Lubbers situation, several of the major trade associations actually expressed support for people who were part of organized labor. I recall, for example, there was strong support for Arthur Goldberg, who was general counsel of the Amalgamated Clothing and Textile Workers, from business; there was strong support for a gentleman whose name is Frankel, who was with the Steel Workers, from business. And yet our—

Senator HATCH. Curtis Mack, who was the original director of the NLRB, I think both would have agreed on him.

Mr. THOMPSON. The chamber, and I think practically all of the business groups, strongly supported Curtis Mack for the General Counsel's job, and he is of course a career Labor Board man. He's the regional director in Atlanta.

Senator HATCH. With practical experience.

Mr. THOMPSON. With some practical experience, yes, but in the case of these last two Board appointments, there was a strong effort made to reach some consensus which simply was ignored by the White House, and you have to then say, the President in making his selection. And again, it's not a question of having any personal animosity toward Mr. Truesdale. We were attempting to find a person we could all support. We didn't oppose Mr. Truesdale the first time he was appointed, and there was good reason for that. We now have chosen to oppose him for two reasons: we think the Board has taken a very sharp turn, as we have discussed here today and on the previous day of hearings; we think he has been a part of that turn, and we think it ought to be brought right out into the open and it ought to be discussed directly and candidly in spite of the fact that we don't like to have to deal in personalities.

Senator HATCH. You are making a pretty serious accusation. You are saying that in prior administrations there was some effort made by whoever was President, whether it was a Republican or a Democrat, to try to accommodate the interests of both business and labor, and that there at least was some effort together to have people who are accessible to both on the Board.

Mr. THOMPSON. Not only was an effort made, but it was made successfully.

Senator HATCH. There were very few dissents to Board members, even though business had its questions and labor had its questions, except for maybe Mr. Miller who was a management attorney.

Mr. THOMPSON. That's correct, and I think another good example of the efforts that were made, when Mrs. Murphy resigned back in December I guess we rather ignorantly assumed that at least another woman would be considered for that slot. When you take into account that today over half of the workers in this country who are supposed to be protected by this law are women, we assumed that there ought to be a woman on this Board, as there had been up until last December, for the previous 5 years, and we really think there should be now. So we came forth with some proposed candidates who were women. We thought, as I say, erroneously, that the President would surely replace Mrs. Murphy with a woman if he didn't reappoint her. We thought he was going to reappoint her, and then she got tangled up in the Lubbers controversy, as you may recall, and I think that she took offense at being—what appeared to be an attempt to use her or hold her hostage, as I read the thing, in order to get our opposition to Mr. Lubbers removed, and so she resigned, and I think properly so. But that is neither here nor there. We just assumed that either she would be reappointed or another woman would be appointed by this President who says he's all for women, but that was not the case. My point here is——

Senator HATCH. Or perhaps a black like Curtis Mack, with proven ability.

Mr. THOMPSON. We thought Curtis Mack was a very good candidate for General Counsel, not only because he was black, but because he was a very qualified man and a man with some practical experience, but we felt that certainly there would be a woman appointed to take Mrs. Murphy's place on the Board, and we put forth the names of several qualified women, who were just about rejected out of hand by the White House, and we were very disappointed over that. And we would hope that somewhere down the line, that some future President would be sensitive to the fact that over 50 percent of the working people in this country are women, and give them a kind of a representative on this Board.

Senator HATCH. Well, let me just get a few more of these cases. I have a lot more, but I will submit some of them to you in writing.

Mr. COLEMAN. Senator, if I might, I would just like to follow up your comment about the impact on small businesses for a minute. Mr. Peter Nash, the former General Counsel of the Board, whose name has been mentioned here several times, at the time of labor law reform introduced some testimony on behalf of the Small Business Legislative Council, and that testimony indicated that 98 percent of all the NLRB elections are held in small business units of less than 400 employees, and 75 percent of the NLRB elections involved units of 50 or fewer employees, so we can see——

Senator HATCH. As I recall, about 57 percent of them were units of 25 or fewer, and almost 50 percent units of 10 or fewer.

Mr. COLEMAN. I think that's correct, so that the real impact of this law is basically on the small employer, and it impacts particularly hard on them and their efforts to——

Senator HATCH. I appreciate having that.

Let me just go to a couple other cases. In Chevron USA, 244 NLRB 160, a 1979 case, the majority of Fanning and Truesdale held that the no-strike provision of the contract which prohibited any "cessation of work through strikes, nonproductive holidays, slowdowns or sitdowns on the part of the union" did not amount to a waiver by the union of the right to engage in a sympathy strike. Now how does the chamber view such narrow interpretations of no-strike clauses by the Board? Was this the first such narrow interpretation, and where do we go from here?

Mr. THOMPSON. Well, naturally we think that this case is contrary to the basic intent of the law, and that is to promote industrial peace, and not promote industrial strife.

Senator HATCH. Well, I presume that businesses give up a certain amount of negotiating rights, or at least a certain amount of power or a certain amount of privileges in order to get a no-strike clause. They don't, the unions just don't buy those cheaply, do they?

Mr. THOMPSON. A no-strike clause is just about the only thing an employer gets out of a collective bargaining agreement, and what has happened over the last several years is, the courts and the Board have eroded the protection of these no-strike clauses by narrow interpretations, and this case I think is a prime example of a very narrow interpretation of no-strike clauses.

The majority was Fanning and Truesdale, and member Penello dissented. It's just another example, I think, of a long line of decisions in recent years which run counter to what we consider to be the basic purposes of this act.

And I would have to say this on the subject of no-strike clauses: I think there is a great need for legislation on this subject. I think we have too many wildcat strikes, we have too many stranger picketing situations, we have too many sympathy strikes, which was what went on in the *Chevron* case. The Board and the courts ought to be looking the other way, in my opinion; they ought to be looking for ways to promote industrial peace.

It almost—well, it does appear to me that they are looking for ways to promote industrial strife when they make decisions like this, and I think it's just clearly bad policy, but it's a policy decision they made, and the panel was Fanning and Truesdale, and I think Mr. Truesdale just has to answer for it.

Senator HATCH. Mr. Coleman, the NLRB has a rule, when there is conduct of an aggravated character, when engaged in by an attorney or other representative for a party, it shall be grounds for suspension or disbarment from further practice before the Board. This is a stern measure, if you consider that the parties should be permitted the attorney of their choice, but the rule furthers Board process. On August 21, 1980, just a couple of weeks ago, the National Labor Relations Board decided in *Fitzsimmons Manufacturing Company,* at 251 NLRB 53, that an employer has the right to refuse to meet with a union representative who has assaulted the employer's representative at a grievance meeting.

I recall in this case the union representative grabbed the employer's representative by the tie and lifted him off his feet, and just beat the tar out of him, maybe roughed him up pretty badly. Member Truesdale dissented, after the Board—well, what happened was that the Board decided that the employer has the right to refuse to meet with a union representative who has assaulted the employer's representative at one of the grievance meetings; that was the decision.

Mr. Truesdale writes a dissenting opinion, believing that a refusal to bargain charge brought by the union should not have been dismissed, and apparently believing that an employer is mandated to bargain with a union agent who grabs a company personnel by the tie and threatens to punch him in the mouth.

So, Mr. Coleman, as an experienced labor lawyer, what effect does this kind of conduct have on the negotiation and labor relations process in general, and what do you think about that dissent with regard to Mr. Truesdale's nomination?

Mr. COLEMAN. Well, quite frankly, Senator, I was astounded reading this dissent and the reasoning behind it. As you have outlined, the facts of the case appeared to be that the union agent in question grabbed the chief management negotiator by the tie, pulled him out of his seat and somewhat across the table, threatened to take him outside and beat the hell out of him in the parking lot or words to that effect, and this was a completely unprovoked assault by this union official.

This incident, I might add, took place in front of the union's bargaining team and the company's bargaining team. How could that management representative maintain any self-esteem in the future in dealing with this type of an individual? And the company, following that, took a very reasonable position it seems to me. They said simply, "We will continue to negotiate with this union. We will meet with your representatives, but we are not going to meet with this individual that engaged in this outrageous conduct." And in spite of that, the union then filed an unfair labor practice charge, and as you have indicated, member Truesdale held that it was an unfair labor practice for the company to refuse to meet with this type of individual.

Obviously, I think that anybody who is experienced and who has been involved in negotiations knows that although negotiations may get heated from time to time and there may be a lot of strong rhetoric, there has to be an underlying credibility between the parties and a respect for each other, and certainly that respect and credibility was utterly destroyed by this one union representative physically assaulting the company's chief negotiator. And I think anyone with any practical experience would realize that that relationship could not be repaired in the future. Yet the import of Mr. Truesdale's decision is to require the company to go through the motions of continuing to meet and negotiate with this particular union individual that made future good-faith bargaining entirely impossible. So to me it was a rather shocking decision on the facts; and, second, the thrust of it was entirely unrealistic in the context of negotiating in good faith.

Senator **Hatch**. It seems to me if this dissent becomes law the management teams are going to have to start looking for ex-pro football players to represent them at the labor bargaining table.

Mr. **Thompson**. If they would give us a little warning, we could prepare for these kinds of things.

Senator **Hatch**. That's what we're afraid of, if that dissent gets through there'll be too much preparation both ways.

Now, isn't this dissenting opinion really destructive to the collective bargaining relationships?

Mr. **Thompson**. We think so.

Mr. **Coleman**. I don't think there's any question about it. As I indicated, Senator, I was really surprised by a dissent——

Senator **Hatch**. There are two reasons I bring it up: No. 1, it was part of a constant pattern of just bending over backward for one side over the other, flagrantly; No. 2, I think because it is so recent, just within 2 weeks, in fact, exactly 2 weeks ago, it shows, you know, this propensity continuing right up to the present time.

Well, I have a lot of others I would like to go over with you, but let me submit those in writing about 3½ hours this morning just to get through this panel, and you are the small part of this discussion here today, so I appreciate listening to you and getting your particular opinions in this matter, and that's all I have, Mr. Chairman.

The **Chairman**. Why don't we just recess for—let's take a 5-minute recess.

[Brief recess.]

The **Chairman**. I missed some of the discussions that Senator Hatch had with some of our witnesses, but I'm sure that the subjects, I hope, that were raised throughout this morning's procedure can be discussed by Mr. Truesdale and Mr. Goldberg, in the cases particularly that have been mentioned.

I am going to have to review with staff briefly here some of the things that came up in my absence, and then we will get into these issues later with Mr. Goldberg and Mr. Truesdale.

All right. I don't have anything further at this time, gentlemen, and we'll be calling our next witnesses. Your associates didn't get a chance to speak up. Did they have anything that they wanted to say at some point during these hearings?

Mr. **Thompson**. I think they are satisfied, I hope they are, with our expression.

Mr. Chairman, will this letter from Mr. Nash to you, which is on the letterhead of his law firm of Ogletree, Deakins, Nash, Smoak, Stewart & Edwards, dated August 28, be made a part of the record?

The **Chairman**. Oh, yes. Yes; that's part of the record.

Mr. **Thompson**. It seems to indicate that he still supports Mr. Truesdale, but for very personal reasons.

The **Chairman**. Well, and if you will notice one of the paragraphs goes to the fundamentals, not just that they have a warm personal relationship. He says:

> In my judgment Mr. Truesdale is an intellectually honest and dedicated Board member. While I may disagree with some of his decisions as a Board member, I do not believe that his entire record indicates a consistent bias in favor of labor's position. For example, while Mr. Truesdale may be criticized by some management representatives for his decision in the General Knit case, which sets stringent standards restricting labor and management from misrepresentation during a union

organizing campaign. I believe the statistics for the last few years indicate that these stricter standards have been successfully used more often by management than by labor, setting aside election losses. Thus, although I personally believe that the General Knit standards represent an unrealistic effort by the Board to protect against nonexistent employee naivete, it is difficult for me to characterize that decision as pro-union.

Mr. THOMPSON. I think it's important also to point out, and I know that it will be in the record, that the first reason given for the support is his personal friendship with Mr. Truesdale, and also I think it's important to point out that his endorsement is strictly personal and he doesn't even have the support of his own law partners in endorsing Mr. Truesdale. That's in the letter, and that should be pointed out for the record, for whatever it's worth.

I don't know whether Mr. Brown has the support of his law partners or not. He neglected to tell us. I'll call him on the phone and see what I can find out.

Thank you very much, Mr. Chairman and Senator Hatch, for your indulgence. You have been very kind in hearing us out.

Mr. COLEMAN. Thank you very much.

The CHAIRMAN. It has been a very interesting hearing. Thank you, gentlemen.

We now again invite Prof. Stephen Goldberg to our witness table, from Northwestern University School of Law, Chicago, Ill. I know that—it has not been an easy task for you to leave your activities in Chicago and be here this second time, and we are greatly appreciative of the effort you have made to help us in our deliberations in this advise and consent capacity we have. Thank you.

STATEMENT OF STEPHEN B. GOLDBERG, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY LAW SCHOOL

Mr. GOLDBERG. Thank you, Mr. Chairman. It's a pleasure to be here.

I have known John Truesdale since the early 1960's, I was a young attorney at the Labor Board and worked closely with Mr. Truesdale on various projects. At that time I gained an appreciation for his intelligence, hard work, and dedication that has remained with me as I have observed his performance in subsequent years.

This is not to say that I have always agreed with Mr. Truesdale's decisions since he has become a member of the Labor Board. Indeed, as my testimony will show, I have frequently disagreed with Mr. Truesdale on the merits of some of those decisions. The basis for that disagreement, however, has never been such as to cause me to doubt his fitness to continue to serve on the Board. To the contrary, I strongly recommend that his nomination be confirmed.

The arguments of those opposing confirmation appear to rest on charges that member Truesdale has, during his term on the Board, demonstrated prounion bias and attempted to implement the ill-fated Labor Law Reform Act. While a number of decisions are cited in support of these charges, I shall address myself only to those few that appear to lie at the core of the argument that member Truesdale should not be confirmed.

Senator HATCH. Mr. Goldberg, if I could just interrupt you for a second.

Mr. **Goldberg**. Certainly.

Senator **Hatch**. That may be part of the accusation made by some people, but on the other hand, part of the fear I think expressed by the business community is that Mr. Truesdale, because of the decisions he has rendered and alleged bias that he has, is part of a group of four which will control the Board and slant the Board so badly toward one side of this equation, that it could seriously damage and harm labor/management relations balance that is needed.

Now, you know, it's a little bit more than just his bias. It's a question of the administration giving no consideration to any of the delicacies involved in having the Board be balanced, and in fact packing or stacking the Board. Mr. Truesdale unfortunately happens to be the fourth member now coming up for—or should I say the fourth person who, if he is confirmed, will become the fourth person on the Board of one persuasion in the eyes of the business community. Now that is a little bit more than what you said, so I just wanted to make sure you understand that.

Mr. **Goldberg**. Well, I have understood that, Senator Hatch, and I have listened with some interest to the way in which the discussion this morning has gone well beyond member Truesdale and into the decisions of other members of the Board. Now in a sense——

Senator **Hatch**. But always involving member Truesdale.

Mr. **Goldberg**. Yes, yes, but you speak of stacking or packing the Board in a certain direction, and I guess the question—I still think the question is whether the appointment of member Truesdale constitutes in any way an improper stacking or packing. It does only if in some respect member Truesdale will not call the shots in a reasonable, legitimate, and fair fashion.

Senator **Hatch**. Well, the difference between you and me apparently is that I think any kind of stacking or packing is wrong per se.

Mr. **Goldberg**. I do not disagree.

Senator **Hatch**. Oh, OK.

Mr. **Goldberg**. I do not disagree, and so the question is whether the appointment of Truesdale constitutes a stacking or packing, and I really do think that it only does if Truesdale is, as the allegations go, biased, unfair, et cetera.

There are certain decisions that have been talked about this morning, and I will only address myself to those. Three of the cases that have come in for the most discussion seem to me to present a common issue, and these are *General Knit of California, Community Medical Services,* and *Suburban Motor Freight.*

There is no need for me to restate the holdings in those decisions, because they have been gone over time and again, and everyone here is familiar with them now, but what the cases have in common is that in each a member of the Board, including member Truesdale, voted in favor of direct governmental protection of employees' statutory rights rather than allowing or deferring to a mechanism for the private protection of those rights.

Thus in *General Knit* one might argue that instead of governmental scrutiny of campaign propaganda for alleged misrepresentations, the Board should let the parties point out to the employees the alleged misrepresentations in each others campaign material, and in that way protect employee free choice without the expense and delay of Government intervention. Indeed, I fully agree with some of the criticisms made here this morning of General Knit.

In *Community Medical Services,* the case in which the Board upset a settlement, one might argue that that was improper, that the Board should let union members decide for themselves if their statutory rights are adequately protected by a settlement agreement, rather than permitting the Board's General Counsel to force litigation on the parties, again leading to expense and delay.

Finally, in *Suburban Motor Freight,* one might hold the union to the results of the arbitration proceedings to which it voluntarily agreed and in which it voluntarily participated, instead of permitting it a second proceeding, an unfair labor practice hearing at governmental time and expense.

Now in my judgment the Board, including member Truesdale, was probably wrong in *General Knit,* and was probably wrong in *Community Medical Services.* I regard *Suburban Motor Freight* as a closer issue. Wrong in choosing more Government involvement, less deferral to private ordering, and less confidence in employees than it should have. And indeed, General Knit is contrary to my previously published recommendations as to the direction in which the Board should go. Indeed, in this respect it is ironic that I should be testifying in support of member Truesdale, who, as has been pointed out, provided the crucial vote, the swing vote in *General Knit* to overrule *Shopping Kart,* and *Shopping Kart* rested squarely on my prior published work.

Despite the seeming basis that I might have for disagreeing with member Truesdale, and perhaps in some peoples' view for opposing his nomination, I am pleased to testify in his support because it is clear to me that there is no valid basis for attacking the fitness or competence of member Truesdale or any other Board member who rules differently than I or others might have done in any of these cases. For in each of these cases there exist legitimate and reasonable statutory grounds on which the Board's decision can be supported.

In *General Knit* it is possible that governmental failure to scrutinize campaign propoganda for misrepresentations would permit both employers and unions to frustrate employee free choice by the extensive use of false and misleading propaganda. In *Community Medical Services,* it is possible that Board approval of an employer-union settlement, without the consent of the General Counsel, would permit a strong employer to bully a weak union into a settlement that would not adequately protect the statutory rights of the union members. In *Suburban Motor Freight,* one can argue that deferring to an arbitrator's resolution of an unfair labor practice issue, when it is not clear that the arbitrator has considered that issue, could easily result in an employee being deprived of his or her statutory rights without a hearing.

Where there exists a legitimate basis for disagreement on how best to protect the statutory rights of employees, and that was the issue in each of these cases, how best to protect the statutory rights of employees, through direct governmental intervention or governmental deferral to private processes, where there exists such a disagreement I think one can hardly reject as prounion those Board members who choose the route of direct governmental action to accomplish that result.

The other three cases on which I shall comment can also be considered together, since according to the opponents of confirmation, they, too, illustrate a single theme: That member Truesdale is part of a Board faction that is attempting to usurp congressional power by making rather than interpreting Federal labor law.

The *Florida Steel* case has been much talked about here today. The charge is that in *Florida Steel*, a majority of the Board, including member Truesdale, attempted to implement the "equal access" provision of the Labor Law Reform Act of 1977, which did not, of course, pass the Congress. This charge I regard as frivolous.

An opportunity to respond to employer campaign speeches as a remedy for prior unlawful conduct, which is what was involved in *Florida Steel*, does not go nearly as far as did the Labor Law Reform Act, which would have required such an opportunity in every election without regard to prior unfair labor practices on the part of the employer. Indeed, the opportunity to respond to employer campaign speeches as a remedy for prior unfair labor practices has been utilized by the Board at least as far back as *Montgomery Ward* in 1964, a decision that was enforced by the sixth circuit as not inconsistent with current law at that time, a dozen years before the Labor Law Reform Act was even proposed.

United Dairy Farmers has also been much talked about this morning, the case in which member Truesdale, along with member Murphy, concluded that the Board may have the authority to issue a bargaining order, even though the union involved never had majority status. While that decision is said to go beyond current law; it is in fact squarely supported by the Supreme Court's decision in *Gissel*.

Now let me explain what I mean by that, because there has been much back and forth about what *Gissel* actually held. In *Gissel* itself, the Supreme Court was dealing with three lower court cases. In one of those cases, which came out of the fourth circuit, the Fourth Circuit Court of Appeals said that it thought that in extreme and outrageous cases the Board may have the authority to issue a bargaining order, even without union majority status. The Supreme Court said, in essence, "We agree with the fourth circuit." "Our position," and I could almost quote the Court, "Our position is not very distant from that of the Court of Appeals for the Fourth Circuit." The plain implication being, the Supreme Court, just as the fourth circuit, said, "The Board may possess this power." Not that it does, not that it does not, but it may; it's an open question in the mind of the Supreme Court.

And that's precisely what member Truesdale said, along with member Murphy, "Maybe we do have this power; maybe we don't have this power." And I must confess, I regard it as a "tempest in a teapot" to attack member Truesdale for saying that maybe the Board has this power. Maybe it does, maybe it does not, but member Truesdale does not hold that the Board does, so I think it is of little consequence that he thinks it's possible, as does the Supreme Court of the United States, that the power may exist. It may.

The final case that I shall discuss is *First National Maintenance Corp.* This is the case in which an employer refused to bargain about a decision to discontinue one of its cleaning and maintenance operations, and the Board held that the employer must bargain about this decision to discontinue one of its maintenance operations.

It is charged by the opponents of confirmation that this decision goes beyond current law, and is again the usurpation of congressional power in attempting to implement some of the plant closing and relocation legislation that has been presented to Congress but not yet adopted. This charge, too, is without merit.

In 1966, long before member Truesdale was a member of the Labor Board, the Board held in a case called *Ozark Trailers* that an employer must bargain about a decision to terminate a portion of its operations, and while the Board has met with some resistance in the courts of appeals, some early resistance to this line of decisions, *First National Maintenance Corp.* is wholly consistent with prior Board decisions. Furthermore, the remedy imposed by the Board in *First National* do not go nearly as far as do the proposals pending before Congress. Those proposals would apply in all plant closings and relocations while the Board's decision here applies only when an employer has engaged in prior unlawful conduct.

To sum up my prepared statement, while I have at times disagreed with John Truesdale on the merits of his decisions, and while I will probably continue to do so, I have no doubt whatsoever as to his ability or fitness to continue to serve as a member of the National Labor Relations Board, and accordingly I strongly urge this committee to recommend that his nomination be confirmed. That concludes my prepared statement.

[The prepared statement of Mr. Goldberg follows:]

STATEMENT OF

STEPHEN B. GOLDBERG
PROFESSOR OF LAW
NORTHWESTERN UNIVERSITY LAW SCHOOL

I HAVE KNOWN JOHN TRUESDALE SINCE THE EARLY 1960'S, WHEN, AS A YOUNG ATTORNEY AT THE NATIONAL LABOR RELATIONS BOARD, I WORKED CLOSELY WITH HIM ON VARIOUS PROJECTS. AT THAT TIME, I GAINED AN APPRECIATION FOR HIS INTELLIGENCE, HARD WORK AND DEDICATION THAT HAS REMAINED WITH ME AS I HAVE OBSERVED HIS PERFORMANCE IN SUBSEQUENT YEARS.

THIS IS NOT TO SAY THAT I HAVE ALWAYS AGREED WITH MR. TRUESDALE'S DECISIONS SINCE HE HAS BECOME A MEMBER OF THE LABOR BOARD. INDEED, AS MY TESTIMONY WILL SHOW, I HAVE FREQUENTLY DISAGREED WITH MR. TRUESDALE. THE BASIS FOR THAT DISAGREEMENT, HOWEVER, HAS NEVER BEEN SUCH AS TO CAUSE ME TO DOUBT HIS FITNESS TO CONTINUE TO SERVE ON THE BOARD. TO THE CONTRARY, I STRONGLY RECOMMEND THAT HIS NOMINATION BE CONFIRMED.

THE ARGUMENTS OF THOSE OPPOSING CONFIRMATION APPEAR TO REST ON CHARGES THAT MEMBER TRUESDALE HAS, DURING HIS TERM

ON THE BOARD, DEMONSTRATED PRO-UNION BIAS, ATTEMPTED TO IMPLEMENT THE ILL-FATED LABOR LAW REFORM ACT, AND BEEN INSUFFICIENTLY SENSITIVE TO THE PRINCIPLE OF STARE DECISIS, I.E., OF FOLLOWING PRIOR BOARD DECISIONS. WHILE A NUMBER OF DECISIONS ARE CITED IN SUPPORT OF THESE CHARGES, I SHALL ADDRESS MYSELF ONLY TO THOSE THAT APPEAR TO LIE AT THE CORE OF THE ARGUMENT THAT MEMBER TRUESDALE SHOULD NOT BE CONFIRMED.

THREE OF THE CASES CAN BE CONSIDERED TOGETHER SINCE THEY PRESENT A COMMON ISSUE. THESE ARE GENERAL KNIT OF CALIFORNIA, 239 NLRB No. 101 (1978); COMMUNITY MEDICAL SERVICES (CLEARHAVEN NURSING), 236 NLRB No. 102 (1978); AND SUBURBAN MOTOR FREIGHT, 247 NLRB No. 2 (1980). IN GENERAL KNIT, THE BOARD OVERRULED SHOPPING KART FOOD MARKET, 228 NLRB No. 190 (1977), HOLDING THAT IT WOULD ONCE AGAIN POLICE CAMPAIGN PROPAGANDA FOR MISREPRESENTATIONS OF FACT OR LAW.

In Community Medical Services, the Board sustained the General Counsel's objections to an employer-union settlement of unfair labor practice charges, on the ground that the settlement, though approved by the union and ratified by the union members, did not adequately protect the statutory rights of the union members. In Suburban Motor Freight, the Board overruled Electronic Reproductions, 213 NLRB No. 758 (1975), holding that it would not defer to an arbitrator's award in unfair labor practice proceedings unless it was clear that the unfair labor practice issue had been presented to and decided by the arbitrator.

What these cases have in common is that in each a majority of the Board, including Member Truesdale, voted in favor of direct governmental protection of employee statutory rights, rather than allowing, or deferring to, a mechanism for the private protection of those rights.

THUS, IN GENERAL KNIT, ONE MIGHT ARGUE THAT INSTEAD OF GOVERNMENTAL SCRUTINY OF CAMPAIGN PROPAGANDA FOR ALLEGED MISREPRESENTATIONS, THE BOARD SHOULD LET THE PARTIES POINT OUT TO THE EMPLOYEES THE ALLEGED MISREPRESENTATIONS IN EACH OTHERS CAMPAIGN MATERIAL, AND IN THAT WAY PROTECT EMPLOYEE FREE CHOICE WITHOUT THE EXPENSE AND DELAY OF GOVERNMENT INTERVENTION. IN COMMUNITY MEDICAL SERVICES, ONE MIGHT LET THE UNION MEMBERS DECIDE FOR THEMSELVES IF THEIR STATUTORY RIGHTS ARE ADEQUATELY PROTECTED BY A SETTLEMENT AGREEMENT, RATHER THAN PERMITTING THE BOARD'S GENERAL COUNSEL TO FORCE LITIGATION ON THE PARTIES, AGAIN LEADING TO EXPENSE AND DELAY. FINALLY, IN SUBURBAN MOTOR FREIGHT, ONE MIGHT HOLD THE UNION TO THE RESULTS OF AN ARBITRATION PROCEEDING WHICH IT VOLUNTARILY AGREED TO, AND VOLUNTARILY PARTICIPATED IN, INSTEAD OF PERMITTING IT A SECOND PROCEEDING, AN UNFAIR LABOR PRACTICE HEARING AT GOVERNMENTAL TIME AND EXPENSE.

In my judgment, the Board was wrong in both General Knit and Community Medical Services (I am not sure about Suburban Motor Freight) in choosing more government involvement, less deferral to private ordering, and less confidence in employees than it should have. Indeed, General Knit is contrary to my previously published recommendations.[1/]

I think it clear, however, that there is no valid basis for attacking the fitness or competence of those Board members who ruled differently than I, or others, might have done in the above cited cases. First, there exist legitimate statutory grounds in each of those cases on which the Board's decision can be supported. Thus, in General Knit, it is possible that governmental failure to scrutinize campaign propaganda for misrepresentations would permit both employers

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[1/] See Getman, Goldberg and Herman, Union Representation Elections: Law and Reality (1976).

AND UNIONS TO FRUSTRATE EMPLOYEE FREE CHOICE BY THE EXTENSIVE USE OF FALSE PROPAGANDA. IN COMMUNITY MEDICAL SERVICES, IT IS POSSIBLE THAT BOARD APPROVAL OF AN EMPLOYER-UNION SETTLEMENT, WITHOUT THE CONSENT OF THE GENERAL COUNSEL, WOULD PERMIT A STRONG EMPLOYER TO BULLY A WEAK UNION INTO A SETTLEMENT THAT DOES NOT ADEQUATELY PROTECT THE STATUTORY RIGHTS OF THE UNION MEMBERS. IN SUBURBAN MOTOR FREIGHT, ONE CAN ARGUE THAT DEFERRING TO AN ARBITRATOR'S RESOLUTION OF AN UNFAIR LABOR PRACTICE ISSUE WHEN IT IS NOT CLEAR THAT THE ARBITRATOR HAS CONSIDERED THAT ISSUE COULD EASILY RESULT IN AN EMPLOYEE BEING DEPRIVED OF HIS STATUTORY RIGHTS WITHOUT A HEARING.

WHERE THERE EXISTS A LEGITIMATE BASIS FOR DISAGREEMENT ON HOW BEST TO PROTECT THE STATUTORY RIGHTS OF EMPLOYEES, AS THERE DOES IN EACH OF THESE CASES, ONE CAN HARDLY REJECT, AS PRO-UNION, THOSE BOARD MEMBERS WHO CHOOSE THE ROUTE OF

DIRECT GOVERNMENTAL ACTION TO ACCOMPLISH THAT RESULT. FURTHERMORE, WHILE TWO OF THESE DECISIONS INVOLVED OVERRULING A PRIOR BOARD DECISION, THAT KIND OF OVERRULING, THAT LACK OF DEFERENCE TO STARE DECISIS, IS LONG-STANDING BOARD PRACTICE. INDEED, THE BOARD IS GENERALLY THOUGHT OF AS STRENGTHENED BY ITS FREEDOM TO ALTER ITS VIEWS BASED ON THE EXPERIENCE AND PERCEPTION OF BOARD MEMBERS. THIS COMMITTEE CAN HARDLY RECOMMEND DENYING CONFIRMATION TO MEMBER TRUESDALE ON THE GROUND THAT HE HAS DONE WHAT DOZENS OF BOARD MEMBERS HAVE DONE BEFORE HIM - VOTED TO OVERRULE A PRIOR DECISION THAT HE THOUGHT WRONG.

THE OTHER THREE CASES ON WHICH I SHALL COMMENT CAN ALSO BE CONSIDERED TOGETHER SINCE, ACCORDING TO THE OPPONENTS OF CONFIRMATION, THEY, TOO, ILLUSTRATE A SINGLE THEME - THAT MEMBER TRUESDALE IS PART OF A BOARD FACTION THAT IS ATTEMPTING TO USURP CONGRESSIONAL POWER BY MAKING, RATHER THAN INTERPRETING, FEDERAL LABOR LAW.

In Florida Steel Corp., 242 NLRB No. 195 (1979), the Board, proceeding against a corporation which had a corporate wide pattern of persistent and flagrant unfair labor practices, granted extraordinary remedies, including an opportunity for the union to have equal time to respond to any employer campaign speeches in the next two years. The charge raised by the opponents of confirmation is that this decision, in which Member Truesdale participated, amounted to an attempt to implement the "equal access" provision of the Labor Law Reform Act of 1977, which did not pass the Congress.

This charge is without substance. Initially, an opportunity to respond to employer campaign speeches as a remedy for prior unlawful conduct does not go nearly as far as the Labor Law Reform Act, which would have required such an opportunity in every election, without regard to prior unfair labor practices on the part of the employer.

Indeed, the opportunity to respond to employer campaign speeches as a remedy for prior unfair labor practices has been utilized by the Board at least as far back as *Montgomery Ward*, 145 NLRB 846 (1964), a decision that was enforced by the Sixth Circuit 2/ as not inconsistent with current law at that time, a dozen years before the Labor Law Reform Act was proposed.

In *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979), Member Truesdale participated in an opinion, with Member Murphy, in which they concluded that the Board "may" have the authority to issue a bargaining order even though the union involved never had majority status. While that decision is alleged to go beyond current law, it is, in fact, squarely supported by the Supreme Court's

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2/ *NLRB v. Montgomery Ward*, 339 F.2d 889 (1965).

DECISION IN NLRB V. GISSEL PACKING COMPANY, 395 U.S. 575 (1969). FOR, IN THAT CASE, THE SUPREME COURT, TOO, INDICATED THAT THE BOARD MAY POSSESS THIS POWER. FURTHERMORE, SINCE MEMBER TRUESDALE DID NOT HOLD THAT THE BOARD DID HAVE THIS POWER, IT IS OF LITTLE CONSEQUENCE THAT HE THINKS IT POSSIBLE, AS DOES THE SUPREME COURT, THAT THE POWER MAY EXIST.

THE FINAL CASE THAT I SHALL DISCUSS IS FIRST NATIONAL MAINTENANCE CORP., 242 NLRB NO. 72 (1979). IN THIS CASE, THE EMPLOYER REFUSED TO BARGAIN ABOUT A DECISION TO DISCONTINUE ONE OF ITS CLEANING AND MAINTENANCE OPERATIONS. THE EMPLOYER THEN DISCHARGED ALL THE EMPLOYEES WHO HAD BEEN EMPLOYED IN THAT OPERATION. THE BOARD HELD THAT THE EMPLOYER MUST BARGAIN WITH THE UNION ABOUT BOTH THE DECISION TO DISCONTINUE OPERATIONS AND ABOUT THE EFFECT OF THAT DISCONTINUANCE ON EMPLOYEES. THE BOARD ALSO HELD THAT THE EMPLOYER MUST PAY

BACK PAY TO THE EMPLOYEES FROM THE DATE THEY WERE DISCHARGED UNTIL THE PARTIES BARGAINED TO AGREEMENT OR TO IMPASSE. THE STATED PURPOSE OF THE BOARD'S DECISION WAS TO PROVIDE THE UNION, IN BARGAINING, WITH SOME OF THE ECONOMIC STRENGTH THAT IT WOULD HAVE HAD IF THE EMPLOYER HAD BARGAINED WITH IT PRIOR TO DISCONTINUING OPERATIONS, AS IT WAS LEGALLY OBLIGED TO DO.

IT IS CHARGED BY THE OPPONENTS OF CONFIRMATION THAT THIS DECISION GOES BEYOND CURRENT LAW, AND IS AN ATTEMPT BY THE BOARD TO IMPLEMENT SOME OF THE PLANT CLOSING AND RELOCATION LEGISLATION THAT HAS BEEN PRESENTED TO CONGRESS, BUT THAT HAS NOT YET BEEN ADOPTED. THIS CHARGE, TOO, IS WITHOUT MERIT. INITIALLY, IT HAS BEEN BOARD LAW SINCE OZARK TRAILERS, INC., 161 NLRB 561 (1966), THAT AN EMPLOYER MUST BARGAIN ABOUT A DECISION TO TERMINATE A PORTION OF ITS OPERATIONS. TO BE SURE, THE BOARD HAS MET WITH SOME

RESISTANCE IN THE COURTS OF APPEALS TO THIS LINE OF DECISIONS, BUT FIRST NATIONAL MAINTENANCE CORP. IS WHOLLY CONSISTENT WITH PRIOR BOARD DECISIONS. FURTHERMORE, THE REMEDY IMPOSED BY THE BOARD IN FIRST NATIONAL DOES NOT GO NEARLY AS FAR AS THE PROPOSALS PENDING BEFORE CONGRESS. THOSE PROPOSALS WOULD APPLY IN ALL PLANT CLOSINGS AND RELOCATIONS WHILE THE BOARD'S DECISION HERE APPLIES ONLY WHERE AN EMPLOYER HAS ENGAGED IN PRIOR UNLAWFUL CONDUCT.

IN SUM, WHILE I HAVE AT TIMES DISAGREED WITH JOHN TRUESDALE ON THE MERITS OF HIS DECISIONS, AND WILL PROBABLY CONTINUE TO DO SO, I HAVE NO DOUBT AS TO HIS ABILITY OR FITNESS TO CONTINUE TO SERVE AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD, AND STRONGLY URGE THIS COMMITTEE TO RECOMMEND THAT HIS NOMINATION BE CONFIRMED.

The **Chairman**. An excellent analysis, a strong, clear statement, and obviously you are in a role that I sort of, perhaps inartistically, described as "Olympian" here. You are not on either side of this thing, labor or management.

Mr. **Goldberg**. I hope not, Senator. Whether it's "Olympian" or not, I'm not so sure I agree with that.

The **Chairman**. Well, Holmes, you are a disciple of Justice Holmes?

Mr. **Goldberg**. Surely. All lawyers are.

The **Chairman**. Now, Professor Goldberg, somewhat to my surprise there has been testimony to the effect that business groups have become less willing to bring their complaints to the Board. As an observer of developments in industrial relations, have you noticed this trend?

Mr. **Goldberg**. No, Senator, I have not. It is not my understanding that business groups have been less willing to file unfair labor practice charges when they thought that unions had violated the National Labor Relations Act. I think they are perfectly willing to do so.

The **Chairman**. And much has been made about this Board's conflicts with the Federal courts. What is the act's intent in regards to the relationship between the Board and the Federal courts?

Mr. **Goldberg**. That is not an easy question to answer. It is the Board that is charged by Congress in the first instance with interpreting and applying the National Labor Relations Act. It must do so on a national basis. When a particular court disagrees with the Board, I think the Board ought to take into account the court's decision and think about it. But if the Board thinks that the court is wrong, however, I think it is incumbent on the Board to stick by its guns, because there is one National Labor Relations Board and there are 11 circuit courts of appeal.

Now if the first circuit or the second circuit disagrees with the Board, I think it would be inappropriate for the Board, if it thinks it's right, to back off. Rather, what the Board should do and what I understand that it does is to say, "Let's see what the other circuits have to say about it, and perhaps eventually, let's see what the Supreme Court has to say about it."

The **Chairman**. So that—it would seem to me that the Board could properly disagree with a particular circuit and then bring it up and seek the decision of the Supreme Court.

Mr. **Goldberg**. Or the other circuits first, yes. Yes, Mr. Chairman.

The **Chairman**. Now, Professor, those testifying against member Truesdale have accused him of acquiescing in a new Board trend of overturning settlement and arbitration results, despite the fact that settlement results are at or near record levels. Two things I would like to ask about this attack: First, what in your opinion is the role of arbitration and settlement, in the NLRA's statutory scheme? And then, following that, Is the Board guilty of lack of deference toward arbitration and settlement results?

Mr. **Goldberg**. The first question, Mr. Chairman, the role of arbitration and settlement in the NLRA's statutory scheme, raises sensitive and difficult issues. There are competing interests here.

There is the interest in disposing expeditiously and promptly of a large volume of complaints, and giving due scope to private resolution of disputes, and that interest militates in favor of giving a good deal of respect to arbitration and settlements.

On the other hand, the Board must adequately protect the statutory rights of employees. The Board is the agency charged by Congress with protecting the statutory rights of employees, so what the Board must do is to make certain the statutory rights of employees are protected, while at the same time giving appropriate deference to private means of dispute resolution. It is a difficult balancing process, Mr. Chairman.

In response to your second question, I think on the whole that the Board is doing an admirable job of balancing these conflicting interests. I have been critical of the *Community Nursing Home* decision. On the whole, though, I think that the Board is doing an admirable job of balancing these competing and difficult interests.

The Chairman. Another case that I think I indicated we would come to you on is the *United Dairy* case. You say that in his concurrence in that case, member Truesdale surely went no further than the Supreme Court in the *Gissel* case. Are you aware of any case in which member Truesdale or the Board, have given a union bargaining rights, absent a showing of majority status?

Mr. Goldberg. No, I am not, Mr. Chairman.

The Chairman. Have you seen John Truesdale express any inclination or willingness to give a union hasn't proven majority status bargaining rights, other than his and member Murphy's simple assertion in *United Dairy* that the Board may have such power? There is a little redundency here; you have addressed yourself to this, but let's have it.

Mr. Goldberg. I have not seen such a willingness on member Truesdale's part, no, sir.

The Chairman. Based on your examination of relevant Federal court and Supreme Court cases, do you believe the Board has under some circumstances the right to give a union bargaining rights, even without proof that it has ever attained majority status?

Mr. Goldberg. Yes, I do. The—nothing in the statute limits the Board's remedial authority under which it issues bargaining orders, to those situations in which a union previously had a card majority. The Board has taken this line as a matter of policy. It is easy for me to imagine a situation in which, for example, the union in its first 2 days of attempting to get cards signed, gets 49 percent of the cards signed. The employer then commits massive and egregious unfair labor practices, and the union never gets another card signed.

Now is the employer to be rewarded because he acted promptly enough and viciously enough to prevent the union from attaining majority status? It's not at all clear to me that he should. It is entirely possible that in that situation the Board would be justified in issuing a bargaining order despite the absence of majority status.

I say that despite the fact that I am no great fan of the bargaining order. I have problems with it, but the notion——

Senator Hatch. That is not the case——

Mr. Goldberg. Excuse me?

Senator Hatch. That is not the case in *Gissel.*

Mr. Goldberg. No, no, not at all.

Senator Hatch. You are citing——

The Chairman. You are citing the——

Mr. Goldberg. Yes, the question was, can I——

Senator Hatch. Assuming you have all these bad things occur, then shouldn't there be some remedy?

Mr. Goldberg. The question is, does the Board under some circumstances, or may the Board under some circumstances have the power to issue a bargaining order absent majority status, and I think the answer to that is, yes.

Senator Hatch. And I think so, too.

The Chairman. [To reporter]. Did you get that last comment?

The Reporter. Yes, sir.

The Chairman. He thinks so, too. I would say that's progress, Professor. You must be one——

Senator Hatch. That's not progress. I've always been there.

The Chairman. The staff thinks it's progress. Well done, Orrin. The Board in the *Florida Steel* case allowed the union access to company property on company time to discuss collective bargaining and other issues in response to Florida Steel's rather poor labor relations record. I mentioned that earlier today. Now, Professor, was this order within the Board's powers?

Mr. Goldberg. While the court in that particular case was unhappy with that remedy, a number of courts in a number of other cases have resolved that issue very clearly. It is within the Board's power under the appropriate facts and circumstances; yes, sir.

The Chairman. Do you agree with the chamber of commerce and NAM's assertions that the use of this remedy amounts to an attempt to institute the "equal access" provisions of labor law reform?

Mr. Goldberg. Clearly not, and as I said in my prepared statement——

The Chairman. Now, you have addressed yourself to that. Let's have a little more redundancy here.

Mr. Goldberg. The Labor Law Reform Act "equal access" provisions would have applied even in the absence of employer unfair practices, and did not rest upon the existence of unfair practices. Here the Board's use of the "equal access" remedy rested squarely upon section 10(c) of the Labor Act which was in the statute, has been in the statute since 1935 and has nothing to do with the Labor Law Reform Act of 1977.

The Chairman. Do you think it was unfair, then, to apply this remedy?

Mr. Goldberg. Not at all; not at all, Mr. Chairman.

The Chairman. You have discussed earlier in your statement your disagreement with Mr. Truesdale's handling of *General Knit.* Frankly, on this issue he and Mr. Thompson might have more common grounds than you have with him. What I am really interested in, though, is whether you feel that *General Knit* can legitimately be construed as a prounion decision?

Mr. Goldberg. It's interesting to talk about *General Knit* as a prounion decision. What many people seem to forget is that *Gener-*

al *Knit* was a case in which a union won representation rights, a the Labor Board took that victory away from the union, so if you going to start pinning labels on things, I suppose *General Knit* w an antiunion decision. I don't regard it as either.

I regard *General Knit* as the Board's attempt to be prostatute, enforce the statute and the free choice provisions of the statute, the Board saw it. I disagree on the merits, as I said, but surely it not prounion, whatever it is.

The CHAIRMAN. You know, Lane Kirkland's statement is w relevant to this business of prounion or promanagement bias th has been bandied about and it will be without any objectio included in the record.

[The prepared statement of Mr. Kirkland follows:]

SUBMITTED STATEMENT OF LANE KIRKLAND, PRESIDENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, BEFORE THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE ON THE NOMINATION OF JOHN C. TRUESDALE FOR MEMBER OF THE NATIONAL LABOR RELATIONS BOARD

September 5, 1980

Mr. Chairman. My name is Lane Kirkland. I am the President of the American Federation of Labor and Congress of Industrial Organizations.

The purpose of my testimony is to state the Federation's support for the President's nomination of John C. Truesdale as a Member of the National Labor Relations Board. I state the AFL-CIO's position in this fashion advisedly. Section 3(a) of the National Labor Relations Act provides that "the Board shall consist of five *** members, appointed by the President by and with the advice and consent of the Senate". Thus, the question before this Committee is whether the President's decision is entitled to concurrence. We believe it is.

That belief is not the product of any illusion that John Truesdale is a partisan for our interests. We know he is not. The labor movement, like employers — and the general public — has a continuing interest in the work of the NLRB. And just as the NLRB and the Chamber of Commerce, both of which have appeared before the Committee on this nomination, follow the Board's course of decision, so does the AFL-CIO. The record shows that Mr. Truesdale is a most moderate man even measured against the standard set by his circumspect colleagues. Taking the rough but useful measure provided by the number of times John Truesdale has voted for the position favorable to labor in cases that gave the Board difficulty — i.e., those in which there was a split among the members — we found that he aligned himself with the position taken by workers and unions approximately 55% of the time. Those numbers place him squarely in the middle of the Board. The comparable figure, for example, for Member Jenkins is 70% and for former Member Murphy was 40%.

Rather, our support for the President's choice is based on the conviction that the Chief Executive has properly done the job delegated to him. There is general agreement that John Truesdale is honest, intelligent, thoughtful and conscientious. He has devoted his adult life to serving the Agency on which he now sits. He knows the NLRB and the law the Board is charged to administer. He has never been employed by organized labor or by management, and there is no indication that he intends to use his Board membership to secure such employment. There is not even a suggestion that he decides cases on any basis other than his considered judgment of the merits.

Obviously those judgments, in the main, are compatible with the President's view of what the NLRA means and how it should be enforced. That is a point in favor of, rather than against, Senate confirmation of John Truesdale's nomination. The substantive portions of the Act run less than ten printed pages. These provisions are intended to regulate a system of industrial democracy over the full range of our vast economy. Plainly, there is more than sufficient room for honest dispute and reasoned disagreement concerning the meaning of the law's generalities and their proper application to particular circumstances. That is why the NLRB was established in the first place. And that is why the Act's appointments provision combines elements of change and of stability. Change is provided for by the limited terms granted to Board members; this assures that each President — the federal official whose election mirrors the current political balance in the Nation as a whole — has through his allotted appointments an influence in the overall direction the law's enforcement will take. Stability is provided for by the fact that Board terms are staggered to assure a certain continuity and an institutional memory.

Despite John Truesdale's apparent qualifications, certain business elements are strongly opposed to his nomination. Judging from the presentations of the NAM and the Chamber of Commerce, business will be satisfied with nothing less than a member who voices a "constantly strong" pro-employer attitude. While I strongly disagree with the proposition that such an attitude — or its opposite — is a qualification for a quasi-judicial office, I can well understand how the Chamber of Commerce and NAM came to their view. They are looking for a successor to the line of such Board members as Guy Farmer, Edward Miller and Peter Walther and such general counsels as Peter Nash and John Irving; individuals whose primary vocation is representing employers, whose avocation is a government appointment, and who, in private life, compete for clients by seeking to outdo one another in denunciation of NLRB decisions that do not go their way. I am confident that this Committee and the Senate will not accede to the NAM and the Chamber's unworthy demand for their own Board members.

Given the aim of the Chamber of Commerce and NAM, it seems apparent that their opposition to the nomination before the Committee is in large part dictated by the fact that this is September of a Presidential election year. Their obvious calculation is that successful delaying action could result in a new nominee by a new President. Labor unions are political organizations and we recognize and respect the importance of partisan maneuvers. But political systems cease to work if the agreed upon limits to such tactics cease to be observed. Calculated efforts to delay one of a series of periodic appointments to decrease the allotment provided by law to one Administration and increase that of the next should, we submit, be regarded as beyond the pale. Certainly such calculations do not provide a proper basis for failing to act on a qualified nominee.

There is an effort in the business testimony presented to this Committee to suggest that during the Nixon-Ford years the Board reached an acme of accomlishment applauded by all responsible observers, that in the last four years the agency has plunged from that pinnacle and that the result threatens sound labor-management relations. There is no basis for this attempt to gild the past and denigrate the present.

The labor movement understood the Nixon-Ford Boards to be exactly what they were — agencies tilted in management's direction by Administrations sypathetic to employers. Moreover, the suggestion that in the past several years the Board has encountered sharper criticism by the courts of appeals than in its prior years is wide of the mark. First, taking the forty years from 1939 through 1979, the percentage of Board decisions enforced in full by the courts was higher during the last three years than it had been in twenty-eight of the previous thirty-seven. Moreover, the decisions of the courts of appeals, which have a regional rather than a national perspective and whose members typically are drawn from the corporate bar, lack experience in labor-management relations, provide an uncertain measure of the correctness of Board decisions. The tendency of these courts over the years has been to resist innovative NLRB opinions that expand workers rights. That is why the early 1970s, during which the Board was narrowing those rights, were characterized by a high enforcement rate. Finally, of course, when one or more of the courts of appeals disagrees with the Board on a matter of importance, that disagreement is normally settled by the Supreme Court. And the Court more often sides with the Board than with the lower courts. In the period 1970 through 1980, forty-six cases involving the Board were decided by the Supreme Court. The Board won twenty-eight cases completely, and lost nine. The remaining cases were remanded or won in part. Thus, the Board was sustained in over sixty percent of these proceedings. And, the figures have remained quite stable from year to year. The figure in the last three years is roughly sixty-one percent, over the previous seven it was sixty-three percent. There is simply no basis for the proposition that the Board has lost its way and must be redirected by a series of new appointees.

Indeed, the most striking aspect of the criticisms of the Board's performance voiced by the NAM and the Chamber is the poverty of the examples used to document the rich rhetoric of denunciation. The Chamber quarrels, for example, with particular applications of the uncertain line between "employee" and "independent contractor", the scope accorded the right of employees to strike to protest a change of supervisory authority, the extent to which employers and unions should be permitted to make misrepresentations during representation campaigns, the degree of deferrence the Board should show to arbitrators' decisions and the extent to which the Board should defer to private settlements. These are the narrow, technical issues that delight the hearts of lawyers and are best left to that profession. But the disagreement voiced does not demonstrate a basis for a "percep[tion] of bias" or for the claim that the "direction of the NLRB [has been] perceptibly altered".

To this point I have dealt in their own terms with the arguments presented by the opponents of this nomination. I wish to conclude by broadening the focus of my remarks. It is my understanding that during the past three years John Truesdale has passed on over 2,000 contested cases. The handful discussed by the NAM and the Chamber of Commerce therefore provide little insight into the quality of the work he has done. Only an understanding of that entire corpus of decision can provide a proper basis of judgment. The President and his advisors have undertaken that study and concluded that Mr. Truesdale is worthy of renomination. We submit that the showing made by those who disagree with the President's judgment is plainly insufficient to justify rejecting this nomination. We urge the Committee to recommend confirmation.

The CHAIRMAN. He doesn't attach a great deal of importance to this statistical analysis on decisions and whether a person is this way, how much, that way, how much, but it has been raised so frequently here by those who are in opposition to Truesdale's nomination that he did do a very brief statistical analysis and he comes up finding Truesdale on the issues, right down the middle.

Mr. GOLDBERG. Is that right?

The CHAIRMAN. Yes, yes.

Mr. GOLDBERG. Well, I agree with Mr. Kirkland that this business of counting cases is an absurd way to proceed in terms of deciding the issue.

The CHAIRMAN. That's why he doesn't emphasize it, but responds, because it has been raised.

Mr. GOLDBERG. Yes; one must look at the merits of individual cases——

The CHAIRMAN. Exactly.

Mr. GOLDBERG [continuing]. Not count noses with cases.

The CHAIRMAN. Now, here is a question that always impresses me. It is central to my arguments in advancing nominees here in our advise-and-consent capacity. The most central search for Senators must be what I am now going to raise with you.

I want to ask you whether you have known John Truesdale for quite a long time; you have already indicated you have. Right on that?

Mr. **Goldberg**. Yes, sir.

The **Chairman**. Do you think there is any legitimate question concerning his integrity or competence?

Mr. **Goldberg**. I did not think so when I entered this room this morning, Mr. Chairman, and nothing that has been said in this room this morning has in any way shaken my belief in the ability, competence, and integrity of John Truesdale.

The **Chairman**. You are not only a student of our labor/management structures and law and all that goes with it, you are a professor of it?

Mr. **Goldberg**. Yes, sir.

The **Chairman**. Is there any legitimate question concerning his fairmindedness or independence?

Mr. **Goldberg**. I can only answer in the same way, Mr. Chairman. I had no basis for doubting his fairmindedness or independence when I entered this room this morning, and none of the attacks that have been made have in any way caused me to waver from my support of John Truesdale.

The **Chairman**. Thank you very much, Professor.

Mr. **Goldberg**. Thank you.

The **Chairman**. Senator Hatch?

Senator **Hatch**. We appreciate hearing you today. I might add that with regard to *United Dairy*, section 7 of the National Labor Relations Act grants employees the right to organize or the right to refrain from that. How is the right to refrain protected when the Board grants a bargaining order in the absence of any showing of majority support for a labor organization?

Mr. **Goldberg**. Senator Hatch, there is a difficult balance to be struck between the right to refrain set out in section 7 and the Board's remedial powers set out in section 10(c). That is not easy to strike. There have been many cases in which there has been, let's say, at one point the union had 51 percent of the cards, let's say, 1978, and the employer commits unfair labor practices in 1978 and the Board issues a bargaining order. The bargaining order comes up for enforcement in 1980, up to the court of appeals. In 1980 there may be no employees who support the union, none.

The courts frequently enforce bargaining orders in those cases. and that raises very similar questions. What becomes of the notion of the right to refrain, of majority choice, when you issue a bargaining order when no one supports the union?

The answer the courts have given has been that we must strike a balance between majority choice, the right to refrain, and the 10(c) remedial power. It is a difficult balance to strike. Senator Hatch, on the whole I would as soon not have bargaining orders. All I say is that there is nothing magic about 51 percent as compared to 49 percent.

Senator **Hatch**. But you have to admit, some of the changes in labor law since member Truesdale has been a member of the Board have been very, very substantive changes of the prior law.

Mr. GOLDBERG. Some changes, yes, there have been some substantive changes in Board law since member Truesdale was appointed.

Senator HATCH. Most of the ones we discussed this morning have been major changes in Board decisions.

Mr. GOLDBERG. Oh, I'm not sure I agree with that, Senator.

Senator HATCH. All right. Now, in some of these—in *Goodwill, Inc.*, we have all admitted that's a particular concern, and I think you have indicated that that certainly is not an antiunion case—or, excuse me, an antimanagement case. And I think at the outset it should be pointed out that the employer in that case was engaged in a charitable, nonprofit, essentially a noncommercial activity. It was established to provide services for mentally, emotionally, and physically handicapped individuals in the State of Maine, but according to the current Board majority, however, disruptions of the free flow of interstate commerce were caused by industrial strife emanating from organizations like Goodwill, and that necessitated that the Board assert its jurisdiction.

If you turn to the merits of the case, in the 30 years preceding *Abilities & Goodwill*, the rule on strike for back pay was clear: Unlawfully discharged working employees were eligible for back pay from the date of their discharge, but unlawfully discharged striking employees were eligible for back pay only after an unconditional offer to return to work, or where there is evidence that any such offer would have been futile after the general abandonment of the strike.

So when *Abilities & Goodwill* was decided, Fanning, Jenkins, and Truesdale decided to reverse that rule. Now, that's what the business community is complaining about, and that's where they find the antibusiness community approach.

Mr. GOLDBERG. In the reversal, the fact of the reversal there?

Senator HATCH. Sure. That they are, you know, they are——

Mr. GOLDBERG. But this is——

Senator HATCH. I think Truesdale basically stated that there was no logical reason which presented itself for treating an employee who is discharged while on strike differently from an employee who is unlawfully discharged while working, and with one stroke of the pen, blew out 30 years of prior Board precedents and decisions.

Mr. GOLDBERG. Well, but it is thought, Senator Hatch, that one of the advantages of these independent agencies with their short terms is to have new members coming on who will take a fresh view and apply their best judgment to individual cases. That is the reason for short terms on the agency. Now Board members——

Senator HATCH. Isn't that the very reason we shouldn't confirm him for another term?

Mr. GOLDBERG. I didn't——

Senator HATCH. Isn't that one of the various reasons why we shouldn't confirm him for another term?

Mr. GOLDBERG. Well, no, I mean the short term as distinguished from many, many years. I'm not talking about 3 years as compared to 8.

Senator HATCH. I see.

Mr. Goldberg. Board members for decades have reversed prior decisions that they thought were wrong, Republicans, Democrats, what have you.

Senator Hatch. This prior decision, I am saying, enacts a labor law reform type provision.

Mr. Goldberg. No. No, sir, there's nothing in the Labor Law Reform Act on this issue.

Senator Hatch. All right. You and I will disagree on that. I, for instance, enjoyed the dissent by Murphy and Penello who basically said, employees who are working at the time of their discriminatory discharge are performing services for their employer in exchange for wages and other benefits; in contrast, employees who are on strike at the time of their discriminatory discharge are voluntarily withholding services from their employer and are not entitled to compensation. Would you differ with that?

Mr. Goldberg. I don't differ with that as a statement of fact. I can not claim to have studied the abilities and goodwill issue carefully, and I'm not prepared to——

Senator Hatch. Well, Mr. Truesdale differed with it.

Mr. Goldberg [continuing]. I am not prepared to defend or attack the rule, the holding in that case.

Senator Hatch. Well, of course, expressly overruling the prior——

Mr. Goldberg. Yes, but there's nothing wrong with that.

Senator Hatch. All right. Except that you can see, when you consider the pattern of the cases—and I have only given a few cases here this morning—why the business people are concerned that they are getting a stacked Board. Mr. Truesdale unlawfully held that a discharged striker should be treated as if the individual were actually at work when discharged, and that has not been law. And that, you have to admit, would be in the eyes of most small business leaders and small businessmen in this country, very anti-small business.

Mr. Goldberg. Senator Hatch, I can not speak or look through the eyes of small businessmen. I can only——

Senator Hatch. Well, it doesn't take any brains to do that, really, and you've got to know—you don't have to speak or look through their eyes. All you've got to do is just be practical and admit that small business people have to be grossly concerned about that type of a ruling.

Mr. Goldberg. I have heard concern——

Senator Hatch. You wouldn't——

Mr. Goldberg [continuing]. I have heard concern from the business community on many decisions. Some of those decisions were sound; some were unsound, and I am not prepared to say that because there are complaints, those complaints are valid.

Senator Hatch. Well, I don't condone illegal discharges, but I would like to say this: Neither do I condone a ruling that forces an employer, as a penalty for his error, to compensate those employees who refuse to work. And I don't think the NLRA—I think you would agree with me, the NLRA was enacted, not to be punitive, but remedial.

Mr. Goldberg. Absolutely, and the question of the appropriate scope of the Board's remedial power has been and will continue to be a difficult question, Senator.

Senator Hatch. That's all. We will submit any other questions to you in writing.

Mr. Goldberg. Thank you, sir.

The Chairman. I think the record is going to be a little confusing on that last case and what the dickens it really did hold. You say you are not fully——

Mr. Goldberg. I have not examined that case carefully. I would be pleased, if the committee would give me an opportunity, to respond and comment on that case in writing, for the record.

Senator Hatch. Well, let me just make it a little more clear, here——

The Chairman. This is a many-faceted presented by that, as I——

Senator Hatch. Yes, but he was presenting the case as not antiunion, not prounion, where the business people were presenting this case as an illustration of a major change of 30 years of prior precedents, and as a practical matter, a rule that compels the employer to prove an unlawfully discharged striking employee's continued support of the strike, even though such allegiance can only be proved by the striker himself in most instances.

And so if the majority here, by—in terms of the court failing to give weight to the Board's considerable practical experience with the policy predicated on such a distinction:

> Their disregard for administrative experience is in marked contrast to the Board's custom of justifying a modification overruling of an established remedial policy by reference to a cumulative experience which has revealed the particular shortcomings of that policy. It may also render liable to sharp judicial scrutiny a remedial determination by the Board which, if reflective of our particular administrative expertise, would ordinarily receive considerable deference upon review by the Court.

But what I am saying is that I was just making clear something that you did not make clear in your analysis of the case, and that is that there is an aspect of that case, the principal aspect of that case, that is very antibusiness, and that is why these people are so alarmed. It's one of the reasons why they are so alarmed.

Mr. Goldberg. Senator Hatch, there may be—I am not certain—I did not refer to abilities and goodwill in my prepared statement as prounion, probusiness, or either. It is not one of the cases that I have focused on——

Senator Hatch. You said it was neither.

Mr. Goldberg. I didn't discuss it, sir.

Senator Hatch. I thought you said it——

Mr. Goldberg. It was *General Knit,* I think——

Senator Hatch. Yes, you did. I thought you said that the union, in fact, lost the——

Mr. Goldberg. That was *General Knit,* Senator.

Senator Hatch. Oh, was that *General Knit?*

Mr. Goldberg. Yes.

Senator Hatch. Excuse me. I got——

Mr. Goldberg. A misunderstanding.

Senator Hatch. OK. I apologize for getting that mixed up.

The CHAIRMAN. I think that the members will be reading this record very carefully, and I would like if possible to have it as clear as I can.

Coming back to the Goodwill situation, case, this is—to the decision on it, the issue is whether an unlawfully discharged striker, unlike an unlawfully discharged employee, must unconditionally request reinstatement in order to trigger an employer's backpay obligation:

> We believe that the equities and policies of the Act compel a negative answer. It is of course well settled that a discriminatorially discharged employee is entitled to reinstatement and back pay from the date of the employer's unlawful action. There is no requirement that such employee first request reinstatement. Indeed, such a request, in all likelihood, would fall upon deaf ears when one considers that the employer has just fired the employee. In this connection the Board has frequently said that it will not require a person to perform a futile act. Furthermore, since it is the employer who has acted unlawfully in discharging the employee, the burden is on that employer to undo its unfair labor practice by offering immediate reinstatement to the employee, and by reimbursing the employee for all losses suffered from the date of its discriminatory action.

Do you want to comment on that?

Mr. GOLDBERG. All I can say, Senator, in fairness to both you and Senator Hatch, I told Senator Hatch I was not thoroughly familiar with that case. One of the hazards of having a law professor testify is that some of us are unwilling to pop off on things we are not sure we know about. I can not claim to be a student of that case; what you have read sounds reasonable, and I can say no more than that.

The CHAIRMAN. Fine. I think, with our deep gratitude, we wish you bon voyage.

Mr. GOLDBERG. Thank you very much, Mr. Chairman. Thank you, Senator Hatch.

The CHAIRMAN. Now, we invite, as we indicated we would earlier at the last hearing, Mr. Truesdale to come to our table for the anchor piece in our hearing.

I am sure that you are organizing your thoughts for this final statement. The forum is yours.

STATEMENT BY JOHN C. TRUESDALE

Mr. TRUESDALE. I have been organizing my thoughts. Also I have made a number of notes as the session went on this morning.

I appreciate the opportunity the committee has given me to appear here today. I am only sorry that Mr. Thompson and Mr. Coleman did not stay, because——

The CHAIRMAN. They said they would, I thought, too; I'm surprised.

Senator HATCH. They told me they had to leave.

Mr. TRUESDALE. I am sorry they didn't stay, because I would like for them to hear some of the comments that I will make.

Senator HATCH. We will see that they get a copy of the record, John.

Mr. TRUESDALE. In any event, I do have some comments that I would like to make, rather brief in nature. while it's fresh in everybody's mind, I would like to start off with just a word or two about *Abilities and Goodwill.*

I think that it is important to remember that in *Abilities and Goodwill* we are talking about unlawfully discharged strikers.

When I came on board—and I think this is an instructive example of the problem that a Board member has—when I came on board, that was—I don't hesitate to say—a two-to-two issue. I looked at it—and I have to bring my own thoughts and my own background and experience to bear on the situation—and I could not see the difference between an unlawfully discharged striker and an unlawfully discharged employee.

Now, I did cast the vote that provided that back pay begins to run for an unlawfully discharged striker in the same way that it begins to run for an unlawfully discharged employee who is not on strike. However, if you read that decision carefully, you will notice that we provided that if the employer is able to show that if the employee has not sought to mitigate the damages by seeking other employment, then back pay is tolled, so that we are not requiring the employer to finance a strike against himself.

Many employers have said to me about that decision that at first they were startled by it, because it seems as if the employer is being required to finance a strike against himself. But then when they look at it to see that we are talking only about unlawfully discharged strikers—if none of them are unlawfully discharged, the problem never comes up in the first place—and that the employer can toll the running of back pay by showing that the employee made no effort to seek other employment in mitigation of back pay, they were not so concerned.

So I think it is very important to keep that very narrow ruling in proper context. I do not see that in any way as antibusiness, whether small or large.

The CHAIRMAN. Are you going on to something else?

Mr. TRUESDALE. I will stop right here if you want me to.

The CHAIRMAN. That issue of mitigation of the damages, what is the obligation of mitigation? Strikers——

Mr. TRUESDALE. An employee who has been discharged unlawfully, so that back pay begins to run, must make an effort to find the employment, and this is true——

The CHAIRMAN. Let's talk about the individual who is on strike.

Mr. TRUESDALE. Same thing, same thing—the employee who is on strike who has been unlawfully discharged——

The CHAIRMAN. I get it. As long as there is the unlawful discharge, on strike or not on strike, you have an obligation to mitigate?

Mr. TRUESDALE. That's right.

The CHAIRMAN. I get it; that's sensible.

Mr. TRUESDALE. As a matter of fact, we recently had a case that did not involve this point, but employees were on strike; one of the employees went off to another town to get a job to keep himself and his family going while the strike was on—he was still supporting the strike. But the issue that arose in that case was the fact that the strike ended and this striker didn't know it. And we got into a problem in that respect. But the point is that employees on strike do go and get other employment. In their free time, and some employees may go fishing, other employees may play softball, and some employees may picket.

But I think it's not at all unusual to find that even striking employees seek other employment. And so far as unlawfully discharged strikers are concerned unless they do, their back pay is tolled.

Now, it's important to realize that if there is no unlawful discharge in the first place, this back pay question never comes into effect.

The CHAIRMAN. Got it; thanks.

Mr. TRUESDALE. Now, it is extremely difficult to defend my record of the past 3 years as Board member against the melange of charges made by the Chamber of Commerce and the NAM.

When member Murphy or member Penello are on the opposite side of a decision from me, this fact is stressed as if to prove that I was wrong. But when I am on the same side as either or both, then most often this fact is conveniently omitted. I am taxed with some cases in which I did not participate, with others even though decided five to nothing by an unanimous full Board. Some cases are cited which purportedly show an antibusiness bias, while my decisions on the other side of the same issue are not even mentioned. While grudging reference is made to some of my decisions which the business community found favorable, other such decisions are simply ignored.

I have participated in over 2,500 published cases. Any reasonable analysis of those decisions would show that I am an evenhanded Board member who calls them as he sees them.

I would like to take just a few minutes to touch briefly on the cases mentioned by the Chamber and the NAM and to put them in their proper context. I don't want to dismay you— this will only take 8 or 10 minutes, I think. And if the case names do not sound familiar, I am going through them in the order in which they appear in the chamber's statement.

In *Air Transit*,[1] it is said the majority ignored the D.C. Circuit's decision in *Yellow Cab Co.*[2] In fact, we responded to it and set forth our differing position, relying on the Supreme Court's decision in *NLRB* v. *United Insurance Company*.[3] The chamber ignores the fact that I have found independent contractor status in *Georgia Pacific*[4] and in *Bellaciccho and Sons*.[5]

The chamber says that the Court's reversal of *Abilities & Goodwill*[6] demonstrates the value of a strong dissent, but in fact the dissent in that case did not even touch on the issue denied enforcement by the first circuit. On that issue—whether employees have the right to protest a supervisory discharge—the Board followed past precedent which has been enforced in other courts.[7] The first circuit's disagreement simply related to the level of supervision involved. The point that we have been mentioning here, Senator, with respect to a discharged striker, an unlawfully discharged striker, the court did not reach that issue in *Abilities and Goodwill*, because they denied enforcement on this point of the right of employees to protest a supervisory discharge. The point that we have been discussing recently was enforced by the seventh circuit in a recent decision called *Mars Sales & Equipment.*

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[1] 248 NLRB No. 140 (1980).

[2] 603 F.2d 862 (D.C. Cir. 1978).

[3] 390 US 254 (1968).

[4] 249 NLRB No. 181 (1980).

[5] 249 NLRB No. 129 (1980).

[6] NLRB No. 5 (1979).

[7] See "NLRB v. Guernsey Muskingum Electrical Corp.," 285 F.2d 8 (6th Cir. 1960); NLRB v Phoenix Mutual Life Ins., Co., 167 F.2d 983 (7th Cir. 1948).

In criticizing *Chevron U.S.A.,*[8] the chamber ignores the impact of the Supreme Court's *Buffalo Forge* decision on this issue—many employers have told me, by the way, that they feel that the Board's decisions in this area flow naturally from the Supreme Court's *Buffalo Forge* decision—the chamber ignores the fact that in the very *Chevron U.S.A.* case that we are talking about, after making the ruling in question, I then joined member Penello to find a violation in that case; and ignores the fact that in Amcar Division ACF, Inc.[9] I dissented and found that the nostrike clause there did encompass a sympathy strike.

The chamber stands my position in *United Dairy*[10] on its head and conveniently ignores the fact that member Murphy's and my opinion in that case constituted a strong statement in favor of the majority-rule principles embedded in the statute. It also ignores the fact that in all decisions on the issue since that date I have consistently declined to enter a bargaining order where the union had never established majority status. I can't tick off the number of them right off the top of my head, but I think there have been 10 or a dozen.

Also, the chamber refers to the "ready availability" of a bargaining order remedy. The chamber has conveniently overlooked the fact that the number of such bargaining orders entered has sharply declined during my time on the Board, as contrasted to the early seventies. We are talking about an entry of bargaining orders in less than 1 percent of the cases. Last year there were 66 bargaining orders entered in all cases—settled cases, ALJ cases, Board cases, court cases; there were 8,000 elections conducted. We are talking about a very small number. The year before that it was 55. In the early seventies it was frequently up as high as a hundred, or consistently in the eighties. Even then, however, a very small percentage. And since we have started keeping these figures—I think in fiscal 1961—99 percent of the time, the question of the union's majority status has been resolved by a secret-ballot election, less than 1 percent of the time by cards.

In *Gaylord Broadcasting,*[11] every page of the contract had been initialled by the parties. The union membership had ratified the contract, and the contract provisions had been placed in effect. The parties then noticed the inadvertent omission of agreed-upon clauses, and the employer requested a change in the vacation provision to make it more workable. A close examination of that decision would establish that it was a unique factual situation which does not represent any departure from the Board's standard contract bar doctrine.

The chamber says that *First National Maintenance*[12, 13] goes well beyond the current law, which, says the chamber, requires bargaining over the effects of a closing, but heretofore not over the managerial decision to close. That statement is simply wrong. Not only does *First National* follow a long line of Board decisions which have been gaining increasing acceptance in the courts; *First National* itself was enforced by the second circuit, perhaps the most prestigious of all the circuit courts, in July 1980. The chamber overlooks the third circuit's scholarly opinion in *Brockway Motor Trucks,*[14] the seventh circuit in *Holiday Inn,*[15] and the third circuit again in *Midland Ross,*[16] all of which held that there was a rebuttable presumption that the employer was required to bargain over the decision to close a part of an operation. The chamber also ignored the Board's decision in *Brooks Scanlon,*[17] in which Member Penello and I found that the employer did not have to bargain over the decision to close because the decision was predicated on economic factors so compelling that bargaining could not alter them. Member Murphy dissented, stating that our conclusion was "unconscionable."

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[8] 244 NLRB No. 160 (1979).
[9] 247 NLRB No. 138 (1980).
[10] 242 NLRB No. 179 (1979).
[11] 250 NLRB No. 58 (1980).
[12] 242 NLRB No. 72 (1979).
[13] 104 LRRM 2924 (2nd Cir. 1980).

The chamber says that by granting access to the union in *Florida Steel,*[18] the NLRB has legislated a remedy that Congress has rejected. As we have seen, over and over again this morning, in fact that remedy is rooted in prior decisions of the Board going back at least to the midsixties, has been used in only a handful of cases involving outrageous, pervasive, serious, recidivist conduct, and has been enforced by the second circuit, by the fourth circuit, and in the very case to which the chamber referred, by the fifth circuit, although it is true that in that case the fifth circuit limited the application of the remedy to plants where the union had been certified as bargaining representative.

I think it's important to note that the Board adopted that remedy in *Florida Steel* only because *Florida Steel* had engaged in unfair labor practices, as I think was brought out this morning, in one place and then used it to chill unionism somewhere else, so that in order to respond to that action of trying to chill unionism in other plants, the Board therefore applied that particular extraordinary remedy to the other plants. Now, the fifth circuit enforced it in the plant where the union was, but did not enforce it in the plants over there; they disagreed with us as to its need in that case. Now, we may have been right, we may have been wrong—I happen to think the courts are the senior partner of the Board in this administration of the act, so when the courts tell us we are wrong, I am not one to sneeze at that. But the fact of the matter is they did not disagree with the principle; they only disagreed with its application in part of the case.

I noted at the outset of my statement that when members Penello and Murphy are on the case with me, that seems not to be mentioned. However, Member Murphy, whose name was not mentioned when she agrees with me, now surfaces in the chamber's statement with "cogent dissents" in several 4-to-1 cases such as *Westinghouse*[19] and *General Motors,*[20] where the Board applied well-established principles requiring the employer to disclose EEO information to the union.

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[14] 582 F.2d 720 (3rd Cir. 1980).

[15] 617 F.2d 1264 (7th Cir. 1980).

[16] 617 F.2d 977 (3rd Cir. 1980).

[17] 246 NLRB No. 76 (1979).

[18] 242 NLRB No. 195 (1979).

[19] 239 NLRB 106 (1978).

[20] 243 NLRB No. 19 (1979).

I will say that Member Penello joined with me on that principle. As I said, the Board was 4-to-1.

Those cases—there is a long line of cases going back many, many years in which the Board and the courts have held that where information is relevant to the collective bargaining and grievance procedure, it is required to be turned over upon request to the union. Now, the fact that these cases involved EEO information may invest them with perhaps more "lex appeal" than some other cases, but it is a straightforward application of a long-established line of cases that have been sustained in the Supreme Court many times.

I will say that when it was brought up this morning that the cost of doing this was considerable, the employer does not have to pay for this; the union has to pay for it—and will not be used, for that reason alone, as a tactic of harassment.

Senator HATCH. You are saying the union would have to pay for the 18,000- to 20,000-hour estimate of time of the management employees?

Mr. TRUESDALE. That's right. Often in negotiations between the employer and the union, they will agree to share it. But the employer is not required to do that. And I am a little hazy on this point, but I do believe that the employer is not required to compile information which he does not have.

Now, if he's got a room full of information, and if he spent a year, he could compile the requested information, I don't think he has to go in and do it. He may have to make that room available to the union to go in and do it.

But if the information is available—and in this line of cases that we are talking about now, I believe the information was available already—then the principle applies. In some respects the information which was requested by the union in that case was not required to be turned over, because we felt it was confidential.

Senator HATCH. I hate to differ with you. I don't know—maybe I've missed it somehow or other—but I don't know of any case where the union had to pay the actual costs of the employer. Almost all the time——

Mr. TRUESDALE. I'm sorry, I can't hear you, Senator.

Senator HATCH. I don't know of really any cases where the union has to pay the actual costs of the employer for complying with the EEO information, generally the courts order the employers to comply.

Mr. TRUESDALE. Well, I hate to disagree with you more than you hate to disagree with me—and if I turn out to be wrong, I will hate it even more. But I do believe——

Senator HATCH. You think you are right on that?

Mr. TRUESDALE. I will be glad to set the record straight on that.

Senator HATCH. It's still a tremendous burden whether the money is paid or not, but I don't know of any case where the union has had to pay. Let's assume that Mr. Coleman's answer of 18,000 to 20,000 hours of executive time, or secretary time, or whatever time it is, had to be paid by the union—I don't know of any case where the union had to pay it, or in fact did.

Do you know of some cases where they did?

Mr. TRUESDALE. I believe in this very case, but, as I say——

Senator HATCH. Do you know of any other cases?

Mr. TRUESDALE. I believe in all cases. I do not think that this is a cost that is taxed against the employer.

Senator HATCH. In other words, if that's is $7 an hour, and that's 20,000 hours, the union would have to come up with $140,000 to get that information?

Mr. TRUESDALE. I believe so. If the employer already has the information, obviously it's not going to cost that. And that raises another point: If they don't have it, then do they have to compile it?

Senator HATCH. According to that case, they did.

Mr. TRUESDALE. I think not. But perhaps the case itself is the best answer to that.

Senator HATCH. All right, sir.

Mr. TRUESDALE. In criticizing *Woelke and Romero,*[21] the chamber neglected to mention that the decision was a five-to-nothing unanimous decision of the Board, and failed to mention that the adverse decision by the ninth circuit has now been withdrawn by the Ninth Circuit for reconsideration en banc. So that the only case that has been up to the courts has been withdrawn by that court; it will now be heard for reconsideration en banc by the ninth circuit. And the second case to reach the courts is still under consideration by the D.C. Circuit.

Senator HATCH. Mr. Truesdale, let me get back to that other point. If you find out that the employer actually has to pay those costs of providing the EEO information—and those are extensive costs—would you be inclined to reverse your opinion?

Mr. TRUESDALE. I certainly have an open mind on that, and I really feel—with perhaps not quite the degree of conviction that I would like to have—that it is not so—but if turns out to be so, then I will reapproach it with an open mind.

Senator HATCH. I see. I hesitate to be critical, but it would seem to me that that should be one of the real crucial considerations as to whether or not a fishing expedition is really taking place.

Mr. TRUESDALE. But that is dealt with in the Board's decision. I don't have them at hand right now.

Senator HATCH. OK, we will both reread that decision.

Mr. TRUESDALE. I will not dwell on *General Knit;*[22] it's been discussed ad infinitum this morning, and I do believe that Mr. Thompson advised the committee on August 22 that he agreed with this decision. That being the case, I am really puzzled to know why he included it in his bill of particulars in the first place.

It is well known in the labor-management community that my vote revitalized the Board's policy of deferring to arbitration, and that as a result of my decisions in this area *Spielberg*[23] is alive and well. Even Member Penello does not defer to every arbitrator's decision. And by dwelling on one case in which I in effect cast th fourth vote to overrule *Electronic Reproduction,*[24] the chamber, I believe, unfairly distorts my position in this area.

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[21] 239 NLRB 241 (1978).

[22] 239 NLRB 319 (1978).

[23] *Spielberg Manufacturing Co., 122 NLRB 1080 (1955).*

[24] *Electronic Reproduction Service Corp.*, 213 NLRB 758 (1974).

Kansas City Star,[25] *Atlantic Steel,*[26] *United States Postal Service,*[27] and many, many other cases show that *Spielberg* is indeed alive and well at the NLRB.

By the way, Mr. Thompson referred to *Bay Shipbuilding,*[28] which is a week or 10 days old, as posturing for renomination. *Fitzsimons*[29] which came out also a week or 10 days ago, I guess he would say, is not posturing for renomination—but I trust we will get to that in a few moments.

I do think that we should go back and look at the entire record of these cases. *Atlantic Steel* is a year old, and is referred to and relied on by me in current decisions, as well as at that time. There is a very great difference between *Atlantic Steel* and *Suburban Motor Freight*[30]—and I will be glad to go into that, as you wish.

Finally, in response to *Clear Haven Nursing,*[31] as Mr. Thompson now notes, the General Counsel filed that appeal in support of the agency's efforts at getting fair and just settlement. That case was subsequently settled, and the fact that last year the agency settled a record number of cases— 85.4 percent—shows that settlement at the Board is still an extremely important feature of the Board's work. *Clear Haven Nursing* does stand there alone. There has not been a case like it before; there has not been a case like it since. And it certainly does not reflect on the Board's strong position in favor of settlement of cases.

In deference to the committee's time, I will not pick my way through the cases cited by the NAM, which in many respects track the chamber's. I would note that I was not even on *Wilson Freight,*[32] *Douglas Aircraft,*[33] or *Sambo's,*[34] and that *Krispy Kreme*[35] was a five-to-nothing decision of the Board in an area still being explored by the Board and the courts. In this latter respect, the decision of the fifth circuit in *Anchortank*[36] is very instructive.

In closing, I would like to point out that neither the chamber nor the NAM saw fit to mention that I joined with Members Murphy and Penello in reaffirming application of the reserve-gate doctrine at construction sites,[37] and in reaffirming the validity of the *Arlan's Department Store*[38] doctrine, and that Member Penello and I have consistently opposed the *Precision Casting,*[39] *Gould*[40] line of cases, and that our positions in this respect have been endorsed by the courts. I point this out only to show how feckless, in my view, is this numbers game in which the chamber and the NAM are engaging here. In evaluating my fitness to continue my service as a member of the National Labor Relations Board, I trust the

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[25] 236 NLRB 866 (1978).
[26] 245 NLRB No. 107 (1979).
[27] 241 NLRB No. 192 (1979).
[28] Bay Shipbuilding Corporation, 251 NLRB No. 114 (1980).
[29] Fitzsimons Manufacturing Co., 251 NLRB No. 53 (1980).
[30] Suburban Motor Freight, Inc., 247 NLRB No. 2 (1980).
[31] Community Medical Services d/b/a Clear Haven Nursing Home, 236 NLRB 853 (1978).
[32] 234 NLRB 844 (1978), enf. den. 604 F.2d 712 (1st Cir. 1979).
[33] 234 NLRB 578 (1978), enf. den. 609 F.2d 352 (9th Cir. 1979).
[34] 247 NLRB No. 122 (1980).
[35] 245 NLRB No. 135 (1979).
[36] Anchortank, Inc. v. NLRB, 104 LRRM 2689 (1980).
[37] Malek Construction Co., 244 NLRB No. 139 (1979).
[38] 133 NLRB 802 (1961). See *The DOW Chemical Company*, 244 NLRB No. 129 (1979).
[39] Precision Castings Corporation, 233 NLRB 183 (1977).
[40] Gould Corporation, 237 NLRB 881 (1978).

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members of this committee and of the Senate as a whole will consider my entire record.

The CHAIRMAN. I hope so, too. And that is part of our mission, to encourage that kind of consideration.

It seems odd to me that the Chamber and NAM cite General Dynamics and Fitzsimons as very recent cases in which you made important new precedents with which they disagree. When they agreed with you on Bay Shipbuilding, they dismissed it as posturing for renomination.

You mentioned this—and I wonder if we could just have a little bit more of your response to that posturing business. You know, that is the only alien thought that has come into this—I mean, importantly alien. What they are saying is that you lack the first and only absolute requirement for the office—integrity. It is as if you are trying to buy into this thing, posturing on an important judicial-like decision, is not that the charge?

Mr. TRUESDALE. Well, if I were posturing for it, yes. But if I were posturing for renomination, I would not have engaged in some of the decisions that I have—on both sides of the fence. I made some employers unhappy and made some unions unhappy.

The CHAIRMAN. It just struck me, as I am saying this, that that accusation went over lightly—I obviously thought it was an inaccurate situation that was hypothesized, posturing through a decision for renomination. But it is so basic.

Do I make myself clear on that, that to posture in a decision for a renomination situation is a very serious thing.

Senator HATCH. Well, if I understood the Chamber and the others clearly, they feel that there has been posturing here. That is up to our colleagues to decide that. But my experience in watching the Board through the years, I have generally found there has been some posturing. But, you know, that is up to our colleagues to decide.

Mr. TRUESDALE. I would like to say about Fitzsimons—a Board member's life is not an easy one; there are a great many hard cases that come along. And I thought that was a very hard case. It is the easiest thing in the world to say that somebody when pulls you up by your tie should be banished from the human race—but I think——

Senator HATCH. Well, that isn't quite the case. This guy roughed up a negotiator for the other side. All the other side said was—which, if I were the employer, I would tell the National Labor Relations Board, if your rule was the ruling, to hang it in its ear, because, to be honest with you, if I have to put up with some ruffian or bully on the other side of the table, how in the world can I get good negotiations?

And that is what is offensive about that dissent of yours in that particular case.

Mr. TRUESDALE. Reading that entire dissent, you will find that the union and this person had an amicable relationship with the employer, that that was a heated moment in which that event occurred, that the person involved apologized, that the union said if it happens again we will banish him—there were all kinds of reassurances made. And for me it came down to the fact that I think the right of a party, an employer or a union, to select its own bargaining representative is of the utmost importance. And I like to look at these cases to see what would happen if the shoe is on the other foot; sometimes I find it very helpful in deciding a case—what would happen if it came before me the other way and the union was refusing to meet with the employer's bargaining representative because he laid a hand on the person, under these circumstances? And the upshot of that would be that the employer would have to fire that person in order to stay in compliance with the statute, if the Board said that the union didn't have to meet with the employer's bargaining representatives.

The rule is that if the event makes bargaining impossible, that then the employer cannot be found in violation of the Act. But here I found, contrary to what Mr. Coleman said, who thought that it made bargaining impossible, I found that it did not reach that extreme and aggravated a situation in the particular facts of this case.

Now, I have no brief for the fact that I am always right, but I gave a great deal of thought to that case, and I thought that in the best interests of bargaining in general, I came down on that side.

Senator HATCH. Mr. Truesdale, the employer would not have to fire a belligerent—a member of his negotiating team if he caused this conduct, but I think a union would be justified in saying we are not going to sit opposite this type of a person who is going to threaten our people and our side.

Now, what happened in that case—I am sure you know it better than I do—but to refresh both our recollections—in fact, according to the stipulated facts in the case, the union representative, Paul Mastos, had met with the company's personnel director, Frank Vogel, to discuss a grievance. During the course of one session a disagreement arose between Mastos and Vogel over the confidentiality of an earlier meeting. The union representative stated that he would "punch Vogel in the mouth and knock him on his ass" if the subject of their disagreement were brought up again. When the subject was later raised, Mastos, according to the facts, interrupted Vogel, reached across the desk, grabbed Vogel by his tie and pulled upward, forcing Vogel to his feet. The two were separated, yet the union representative challenged Vogel to come outside to the parking lot. The challenge was declined and the meeting broke up. Later the company personnel director was treated at a hospital for back pains. The company then advised the union it would no longer meet with the labor organization if Mastos were present. And, of course, the question before the Board was whether the employer committed an unfair labor practice in refusing to meet with Mastos, and Members Jenkins and Penello held for the company, saying that the disruptive conduct directed at one of the employer's top management officials weakened the fabric of the bargaining relationship and engendered such ill will as to legally entitle the employer to refuse to meet with Mastos.

Now, you, however, dissented. You stated that an employer was wrong in insisting that the union select another spokesman. In your opinion, it would seem, the law of the land is that all union officials should be given at least one chance to commit assault and battery against company representatives without reprisal.

Now, I can say this, if the company man did that, they would not have to fire him, but I think the union would be justified in saying we will not meet with you in the presence of that man.

Mr. TRUESDALE. Senator, excuse me.

Senator HATCH. Sure.

Mr. TRUESDALE. You read from the majority. My dissent is relatively short—I do not have a copy of it here. Would you read the dissent?

Facts are everything in this particular case.

Senator HATCH. Let me read it.

> Unlike my colleagues, I do not find that Mastos' isolated outburst justified Respondent's refusal to meet with him as collective bargaining representative for respondent's employees. Further, I am unable to conclude that Mastos' presence at the bargaining table would create such ill will as to make good-faith bargaining between Respondent and the Union impossible. Accordingly, I would find that Respondent has violated Section 8(a)(5) and (1) of the Act.
>
> The record shows that Mastos had been the Union's international servicing Representative at respondent's West Branch plant since the first collective bargaining agreement between Respondent and the Union, which followed the Union certification in 1973. Prior to June 29th, Mastos had not engaged in any physical altercations with any of Respondent's management personnel, and the record indicates that several labor-management problems, including the strike in 1977, and the suspension of the bargaining committee members which followed the strike, had been resolved through negotiations between Mastos and Respondent.
>
> A review of the incident on June 29th indicates that Mastos' conduct resulted from momentary anger at the possibility that Vogel, Respondent's corporate personnel director, was again going to raise the subject of the October 1977 grievance meeting, a subject about which Mastos was particularly sensitive. Indeed, Mastos' sensitivity about this subject was well known, as evidenced by his remarks to Vogel prior to the bargaining committee's return to the negotiation room and by his earlier telephone conversation with Plant Manager Foltz in which he complained about Foltz's reference in response to a grievance to the October meeting. Furthermore, from September, when Respondent's advised the Union that it would not meet with the Union if Mastos was present as designated representative, through November the union's attorney met with the Respondent's attorney and attempted to resolve the matter. During these meetings the Union's attorney offered assurances that severe action would be taken by Mastos' superior if any further incidents occurred. Finally, it is clear that whatever hostility existed between Mastos and Vogel as a result of the June 29 incident ceased to affect labor-management relations between Mastos and Respondent when Vogel left Respondent's employ in November.
>
> In view of the foregoing facts, I find that respondent was not justified in refusing to meet with Mastos as the designated representative of respondent's employees for the purposes of resolving grievances under the collective bargaining agreement between Respondent and the Union. [footnote omitted.]
>
> In so doing, I emphasize that I do not condone Mastos' conduct on June 29th. However, it must also be stressed that the Board consistently has expressed in the strongest terms its concern in protecting the fundamental right of employees to select their representatives for collective bargaining purposes. In furtherance of this concern, the Board has imposed a high standard on a party which refuses to deal with the selected representative of the other party to a collective bargaining relationship. My colleagues have accurately stated that test, that good-faith bargaining must be impossible. Unlike my colleagues, however, I am unable to conclude that respondent has met this standard in the circumstances of the case. In this regard, I particularly note the history of harmonious collective bargaining for several years prior to the June 29th incident, the absence of any evidence that Mastos had a proclivity to engage in such conduct, the union's personal assurances, coupled with the assurances contained in the settlement agreement, and the fact that Vogel has left Respondent's employ. [footnote omitted.]
>
> In these circumstances I cannot find that Respondent has demonstrated by persuasive evidence that Mastos' presence at the bargaining table would be such a disruptive force as to make any attempt at good-faith bargaining impossible or that Mastos' conduct created such underlying hostility as to warrant relieving Respondent of its duty to deal with the Union's chosen representative.

Accordingly I would find lawful Respondent's refusal to meet and bargain with Mastos. [Footnote omitted.]

Was the issue of continuing Mastos as an agent ever put to the employees for a decision?

Mr. **Truesdale**. You ask that question?

Senator **Hatch**. Yes, I am asking you that.

Mr. **Truesdale**. We had that on a stipulation of facts, so I——

Senator **Hatch**. So you don't know, you don't remember. Let me give you my impression. If I were a management official and I wanted to have a long-term, good-faith, reasonable relationship with my union collective bargaining representatives, and I wanted my people to feel as though we backed them up, and to feel as though that relationship was going to be on a professional, decent basis, I would have refused to bargain with that man there, too, under those circumstances, under those facts, and under what happened there, just like Jenkins and Penello felt, because I think it would undermine the morale of my team even if Vogel ultimately did leave.

Now, you apparently disagreed, but I think that is a pretty significant disagreement.

Mr. **Truesdale**. I thought it was a bad road to go down. Reasonable men can differ on that situation. I myself thought it was a bad road to go down, did not know what it would lead to, particularly when the shoe was on the other foot. You say the employer doesn't have to fire the director of industrial relations, but——

Senator **Hatch**. Neither would the union have to fire Mastos.

Mr. **Truesdale** [continuing]. If he engages in bargaining for the employer, he will have to do something with him, if the union won't sit across the table from him.

Senator **Hatch**. Well, that may be, but they don't have to fire him. The union doesn't have to fire Mastos either. But the fact of the matter is they don't have to meet with him.

And I find that a very strange, very detrimental, very hard precedent, and you can see why I think—at least I can see why business would be very concerned, if they have got to be threatened and put up with that kind of conduct, and then say they are committing an unfair labor practice because they refuse to put up with that kind of conduct.

The **Chairman**. But I thought that each side had designated someone to try to work out an agreement that this wouldn't happen again, is that right?

Mr. **Truesdale**. Well, there were assurances given that it would not.

The **Chairman**. Assurances.

Mr. **Truesdale**. And it had never happened before.

The **Chairman**. And it never happened before, if these were assurances it wouldn't happen again—all right, if they went back to bargaining and it did happen again, where would you stand then?

Mr. **Truesdale**. The man would be out.

The **Chairman**. There it is. I would think in our contentious society and political world, we get extremes some times in our differences with even colleagues, certainly opponents—but we find that another day we are going to have to bury the hatchet and get along.

Senator Hatch. No question, we are professionals, we are able to do that.

The Chairman. And that is exactly what was attempted here: to bury the hatchet. Am I right?

Mr. Truesdale. That's right.

The Chairman. And assurances were given that they would bury it.

Senator Hatch. As long as the employer caved in, they would bury it right in his head, it seems to me. That's the problem. The hatchet has to be buried against the employers. That's why these people are so upset, because it seems that when the hatchet has to be buried it's always on the employers hide.

The Chairman. I thought Mr. Truesdale had already put on the other shoe to see how it would fit; and you said that on the other side you would tell the union they had to bargain with a personnel manager that had called them all kinds of——

Mr. Truesdale. No question about it.

I was just looking through my notes here—in no order of particular importance—I would like to clarify the record that I was not in Hawaii in August 1980, and none of the other Board members were in Hawaii for the ABA convention this year. That speech was given on May 1 in New Orleans, a different ABA meeting.

The Chairman. The Irving speech?

Mr. Truesdale. The what?

The Chairman. Which speech now?

Mr. Truesdale. The John Irving speech; the-good-fortune-to-have-John-Truesdale-here-speech—that was in New Orleans on May 1 this year. None of the Board members were in Hawaii in August 1980.

Senator Hatch. I see, but this may be a good time to bring out that I asked you for a summary of your speaking engagements and other trips made on behalf of the Board since October 25, 1977—basically over the 1978–79 period.

And I would ask that all of that information be put into the public record, but I think it should be noted that total taxpayer cost for your travel during the last a little over two years has totalled $20,334.44.

Mr. Truesdale, don't you think that's a little bit enormous and perhaps an unreasonable cost to be borne by the taxpayers of this country? And I would just like to ask you, assuming that you are confirmed, do you intend to continue the frequency of this travel, if confirmed by the Senate?

Mr. Truesdale. Senator Hatch, I don't like to characterize that figure. I think that it is very important that Board members go out and meet with people in the labor-management community. I think almost invariably those meetings and trips that you mentioned result from people inviting me to go out and appear. I am not by any means the champion traveler in that respect.

Senator Hatch. You mean there is somebody who spends more than $20,000—about $21,000 or $20,000—in 2 years?

Mr. Truesdale. Three years, approximately.

Senator Hatch. Who spends more?

Mr. **Truesdale**. What?

Senator **Hatch**. Who actually on the Board is a better traveler than you?

Mr. **Truesdale**. Oh, I'm sure member Murphy——

Senator **Hatch**. She did a lot of traveling?

Mr. **Truesdale** [continuing]. Has me beat hands down.

Senator **Hatch**. She's not on the Board.

Mr. **Truesdale**. She had me beat hands down when she was. I think it must be said that the "new boy on the block" tends to get a lot more invitations than anybody else. And I think it also needs to be said that I have been with the Board a long time, I know a lot of regional directors, I know a lot of people in the labor-management community. You must know the problem of the program director who wants someone to come out and——

Senator **Hatch**. Sure.

Mr. **Truesdale** [continuing]. Explain recent decisions and that kind of thing. They call up and they twist my arm. I think that it is an important thing to do. I am not at all defensive.

Senator **Hatch**. I presume you fly in, you give your speech, and you fly out then?

Mr. **Truesdale**. Most often.

Senator **Hatch**. Well, it's my understanding that that is not the case.

Mr. **Truesdale**. As a typical example——

Senator **Hatch**. That you spend 3 or 4 days——

Mr. **Truesdale**. I have in some meetings that went on for 3 or 4 days.

When the Board does not go, or when no Board representative does go, as this year, to Hawaii, the labor-management community is very unhappy and lets us know about it. And I think that it is important for the Board to get out and hear what people are saying and thinking, it's a very important function of the Board.

I am sure if we stayed in Washington and did not go out to attend meetings that we are invited to of this sort, that we would be accused of staying in an ivory tower.

The **Chairman**. You're darn right—out of touch, aloof.

Senator **Hatch**. I have no problems with you speaking on occasion, there's no question, like before ABA.

The **Chairman**. We even travel a bit.

Senator **Hatch**. Yes; Senators have a tendency to travel, and I am known for that myself. On the other hand, our position is a little bit different from a quasi-judicial position. We do have an obligation to get out and warn the people and talk about what's going on here and explain it all over the country—and I am not saying you don't; you have an obligation to perhaps appear before the American Bar Association or—I presume some of these were union events as well as management events?

The **Chairman**. The very same position—we all turn down a Hawaii, too; you did, we did. Too far.

Mr. **Truesdale**. I would say those meetings were heavily Bar Association, IRRA, management groups, and, in a minority, union meetings—there were only a handful of those.

Senator **Hatch**. Well, I would ask, Mr. Chairman, that this matter be put in the record—I would ask that these be put in the record, for whatever worth they are.

The **Chairman**. What are those, the questions——

Senator **Hatch**. The materials provided by Mr. Truesdale for the record.

The **Chairman**. Yes.

Mr. **Truesdale**. I think, Senator, if that is to be placed in the record, then I would also want placed in the record information with respect to the time that I have spent in Washington outside of office hours so as not to be a bottleneck at the Board. I feel that it is important for the Board to fulfill this public function within reason; it's more important to get decisions out. I suppose that I take cases home every single night and spend 3 or 4 hours at night working on cases—most all Saturdays and Sundays—and I would want that placed in the record, too.

The **Chairman**. Yes, it will be.

[The following was received for the record:]

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

August 21, 1980

Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

In accordance with your request of August 18, 1980, I am furnishing herewith the dates, times, places, costs to the government, and reasons for each trip I have made out of Washington, D. C., since October 25, 1977, when I took the oath of office and assumed my duties as a Member of the National Labor Relations Board.

I am also enclosing a copy of my letter to you of May 16, 1978 in which you asked for similar information earlier in my term. As noted therein, and as is still true, I spend at least two and often four or more hours almost every weekday night working at home on cases, usually take cases with me on trips out of town, and spend a substantial part of Saturdays and Sundays working on cases either at home or at the office. Also, considerable time is spent in telephone contact with my office when I am in travel status.

I believe that the speeches made and meetings attended by Board Members are in the best interests of the government, the agency, and the general public. As I noted in my letter of May 16, 1978, through participation in such activities, Board Members are able to discuss the actions of the agency, the purposes of the statute, and developments in the law, and to achieve better understanding and greater acceptance of them.

I trust the material submitted is responsive to your request. In response to "the purpose for each date of [my] out of town stay," I was able to respond only in general terms, or if there was more than one purpose (i.e., more than one speech) so to indicate.

Please let me know if I can be of further help to you.

Sincerely,

John C. Truesdale
Board Member

Enclosures

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
6:00 p.m., Tuesday, December 27, 1977 - 1:00 p.m., Friday December 30, 1977 (worked at office Friday p.m.)	New York City	Annual Meeting of Industrial Relations Research Association; Visits to Regions 2 and 29	$293.18
5:20 p.m., Wednesday, January 18, 1978 - 4:45 p.m., Saturday, January 21, 1978	Los Angeles, California	Speech to Los Angeles Chapter, IRRA; Visits to Regional offices 21 and 31 (Los Angeles)	$754.01
2:00 p.m., Sunday, January 29, 1978 - 7:45 p.m., Saturday, February 4, 1978	La Quinta, California	Speech to and meeting with Committee on NLRB Practice and Procedure, ABA Labor Law Section	$774.76
3:25 p.m., Thursday, February 16, 1978 - 8:44 p.m., Friday, February 17, 1978	Baton Rouge, La.	Speech to LSU Labor Law Seminar	$406.76
9:15 a.m., Sunday, February 26, 1978 - 7:02 p.m., Wednesday, March 1, 1978	St. Thomas, U.S. Virgin Islands	Speech to and meeting with Committee on Developing Labor Law, ABA Labor Law Section	$712.65

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
9:00 a.m., Sunday, March 12, 1978 - 1:00 p.m., Monday, March 13, 1978	New York City	Participate as Judge on New York Law School Wagner Labor Law Moot Court	$152.65
12:00 noon, Monday, March 20, 1978 - 10:00 p.m., Monday, March 20, 1978	Newark, N.J.	Speak to and honoree of reception by Labor Law Section of New Jersey Bar Assn.; Visit Region 22	$114.85
4:30 p.m., Wednesday, April 5, 1978 - 9:45 p.m., Friday, April 7, 1978	New Orleans, Louisiana	Annual Meeting of National Academy of Arbitrators; Visit Region 15	$529.81
5:30 p.m., Tuesday, April 11, 1978 - 4:40 p.m., Friday, April 14, 1978	San Francisco, California	Annual Meeting of NLRB Regional Directors; Visit Regions 20 and 32 and West Coast ALJ office	$852.20
9:00 a.m., Tuesday, April 18, 1978 - 3:23 p.m., Wednesday April 19, 1978 (returned to office)	South Bend, Indiana	Participate as Judge on Notre Dame Law School Moot Court	$164.00

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
11:00 a.m., Sunday, April 30, 1978 - 1:00 p.m. Tuesday May 2, 1978	Atlantic City, N. J.	Speech to 1st Annual Convention of Telecommunications Int'l Union	$104.90
9:00 a.m., Wednesday, May 10, 1978 - 10:17 a.m., Thursday, May 11, 1978	Cincinnati, Ohio	Speech to Joint Meeting of Labor Law Section of Cinncinati-Dayton Bar Assn; Visit Region 9	$203.00

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
10:00 a.m. Wednesday, May 17, 1978 - 11:00 a.m. Thursday, May 18, 1978	Boston, Mass.	Labor-Management Symposium sponsored by Regional office. Visited Regional office	$172.50
8:40 a.m. Tuesday, June 13, 1978 - 9:15 p.m. Thursday, June 15, 1978	San Juan, P.R. New York, N.Y.	Represent Board at swearing in of Regional Director Spoke to NYU Labor Law Symposium Visited Regional office	$657.20
10:00 a.m. Sunday, August 6, 1978 - 9:00 p.m. Wednesday, August 9, 1978	New York, N.Y.	Annual Meeting of ABA Visited Regional office	$338.57
6:30 p.m. Saturday, August 26, 1978 - 9:18 p.m. Wednesday, August 30, 1978	Chicago, Ill. Peoria, Ill.	Visited Chicago Regional office; attended annual meeting of IRRA; represented Board at swearing in of Regional Director	$370.50
8:08 a.m. Wednesday, September 6, 1978 - 6:30 p.m. Wednesday, September 6, 1978	Cleveland, Ohio	Spoke to Federal Bar Assn. Visited Regional office	$164.60
10:00 a.m. Saturday, September 9, 1978 - 4:30 p.m. Saturday, September 16, 1978	Tampa, Fla. Tarpon Springs, Fla.	Visited Regional office on several occasions; attended National Lawyers Conference of Retail Clerks Union	$505.49
9:00 a.m. Wednesday, September 20, 1978 - 6:00 p.m. Thursday, September 21, 1978	San Diego, Cal.	Represented Board at opening of San Diego resident office	$593.00
3:30 p.m. Monday, September 25, 1978 - 1:45 p.m. Wednesday, September 27, 1978 (returned to office)	Cincinnati, Ohio St. Louis, Mo.	Spoke to Bar Assn. Visited Regional office Spoke to Bar Assn. Visited Regional office	$389.15
			$8253.78 FY 1978 total

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
2:30 p.m. Tuesday, October 17, 1978 - 1:30 p.m. Wednesday, October 18, 1978 (returned to office)	Syracuse, N.Y.	Spoke to IRRA Spoke to LeMoyne College	$133.75
10:30 a.m. Saturday, October 21, 1978 - 11:45 p.m. Wednesday, October 25, 1978	Phoenix, Arizona	Attended and spoke to annual meeting of New York State Management Lawyers Conference; Visited Regional office	$546.70
3:00 p.m. Thursday, November 2, 1978 - 1:30 p.m. Friday, November 3, 1978 (returned to office)	Detroit, Mich.	Spoke to IRRA Visited Regional office	$176.00
6:15 p.m. Thursday, November 16, 1978 - 4:15 p.m. Sunday, November 19, 1978	Clearwater, Fla.	Attended meeting of and spoke to Sunshine Chamber of Commerce Visited Regional office	$345.25
1:00 p.m. Tuesday, November 21, 1978 - 8:30 a.m. Wednesday, November 22, 1978 (returned to office)	Buffalo, N.Y.	Spoke to IRRA Visited Regional office	$145.25
4:00 p.m. Wednesday, November 29, 1978 - 1:30 p.m. Friday, December 1, 1978 (returned to office)	Baltimore, Md. Pittsburgh, Penn.	Spoke to IRRA Spoke to labor-management symposium sponsored by Regional office Visited Regional office	$154.50
2:15 p.m. Thursday, December 7, 1978 - 3:00 p.m. Friday, December 8, 1978 (returned to office)	Atlanta, Ga.	Eleventh Annual Labor Relations Institute Visited Regional office	$231.50

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
11:30 a.m. Saturday, December 9, 1978 - 10:00 p.m. Monday, December 11, 1978	New York, N.Y.	Attended Israel bond dinner Spoke to Fifth Annual Labor Law Institute	$147.25
11:00 a.m. Monday, January 15, 1979 - 6:15 p.m. Friday, January 19, 1979	St. Croix, V.I.	Attended meeting of and spoke to ABA Committee on NLRB Practice & Procedure	$593.50
4:00 p.m. Thursday, February 22, 1979 - 5:30 p.m. Monday, February 26, 1979	San Francisco and Yosemite, Cal.	Attended and spoke to annual meeting of San Francisco Bar Assn. Visited Regional office	$704.16
2:00 p.m. Wednesday, February 28, 1979 - 9:30 p.m. Saturday, March 3, 1979	Dallas, Texas Ft. Lauderdale, Fla.	Spoke to Federal Bar Assn. Spoke to First Annual Nova University Labor Law Conference	$298.95
8:50 a.m. Thursday, March 15, 1979 - 11:00 p.m. Friday, March 16, 1979	Phoenix, Ariz.	Spoke to annual Univ. of Ariz. labor law symposium Visited Regional office	$574.50
2:00 p.m. Friday, March 23, 1979 - 10:45 p.m. Sunday, March 25, 1979	Boston, Mass.	Spoke to annual Boston U labor law conference Attended opening of Regional Director's Conference	$226.75
2:30 p.m. Tuesday, March 27, 1979 - 11:00 a.m. Friday, March 30, 1979	Boston, Mass.	Attended Regional Directors Conference Visited Regional office	$277.75
1:30 p.m. Wednesday, April 18, 1979 - 8:30 p.m. Thursday, April 19, 1979	Hartford, Conn.	Spoke to annual Massachusetts arbitration conference	$167.85

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
3:15 p.m. Tuesday, April 24, 1979 - 11:00 p.m. Tuesday, April 24, 1979	Philadelphia, Penn.	Spoke to Philadelphia management lawyers group	$70.75
3:00 p.m. Tuesday, May 8, 1979 - 5:00 p.m. Sunday, May 13, 1979	Seattle, Wash.	Spoke to and attended annual Northwest labor law symposium Visited Regional office	$136.95
4:15 p.m. Wednesday, May 23, 1979 - 10:00 p.m. Thursday, May 24, 1979	New York, N.Y.	Attended annual AAA arbitration conference	$193.60
5:45 p.m. Wednesday, June 13, 1979 - 2:59 p.m. Sunday, June 17, 1979	Orlando, Fla.	Visited Regional office Attended annual meeting of Florida Bar Assn.	$351.90
7:30 a.m. Tuesday, June 19, 1979 - 7:30 p.m. Thursday, June 21, 1979	Los Angeles, Cal.	Visited Regional office	$690.50
9:15 a.m. Thursday, July 5, 1979 - 2:18 p.m. Friday, July 6, 1979	Miami, Fla.	Spoke to Nat'l Federation of Blind annual convention	$324.65
6:20 p.m. Tuesday, July 24, 1979 - 8:00 p.m. Wednesday, July 25, 1979	Madison, Wisc.	Attended annual convention of Society of Professionals in Dispute Resolution	$323.15
4:00 p.m. Thursday, August 2, 1979 - 9:36 p.m. Wednesday, August 15, 1979	Denver, Colorado Durango, Colorado Denver, Colorado Dallas, Texas	Visited Regional office Attended Nat'l Retail Clerks Lawyers conference Visited Regional office Attended annual ABA convention	$1021.92
			$7837.08 FY 1979 total

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
6:45 a.m. Sunday, October 7, 1979 - 9:00 p.m. Wednesday, October 10, 1979	St. Croix, V.I.	Attended and spoke to annual meeting of New York State Management Lawyers conference	$585.90
2:45 p.m. Tuesday, October 16, 1979 - 3:30 p.m. Saturday, October 20, 1979	Dallas, Texas New York, N.Y.	Spoke to Southwest Legal Foundation Spoke to Cornell Univ. symposium on Fair Representation	$141.25
3:00 p.m. Tuesday, October 30, 1979 - 6:30 p.m. Friday, November 2, 1979	South Royalton, Vermont	Spoke to several classes of Vermont Law School	$167.75
2:15 p.m. Sunday, November 4, 1979 - 7:30 p.m. Tuesday, November 6, 1979	Miami, Fla.	Attended and spoke to national lawyers conference of Int'l Brotherhood of Teamsters	$154.50
4:30 p.m. Tuesday, December 4, 1979 - 7:48 p.m. Thursday, December 6, 1979	Las Vegas, Nev.	Spoke to First Annual Labor Law Symposium of Univ. of Nevada, L.V.	$355.00
10:30 a.m. Monday, January 28, 1980 - 11:20 p.m. Thursday, January 31, 1980	St. Thomas, V.I.	Attended and spoke to annual meeting of ABA Committee on NLRB Practice and Procedure	$573.55
4:15 p.m. Thursday, February 28, 1980 - 11:00 p.m. Monday, March 3, 1980	Yosemite, Cal.	Attended and spoke to annual meeting of San Francisco Bar Assn.	$485.50

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government
9:00 a.m. Tuesday, March 4, 1980 - 9:00 p.m. Sunday, March 9, 1980	Tampa, Fla. Marco Island, Fla.	Visited Regional office Attended and spoke to annual meeting of ABA Committee on NLRB Developing Law	$470.49
7:30 a.m. Sunday, March 30, 1980 - 10:00 p.m. Sunday, March 30, 1980	New York, N.Y.	Be a judge at annual Robert F. Wagner National Moot Court Competition	$134.00
9:45 a.m. Sunday, April 27, 1980 - 12:00 noon, Tuesday, April 29, 1980 (returned to office)	Des Moines, Iowa	Attend opening of resident office	$387.20
4:05 p.m. Wednesday, April 30, 1980 - 4:44 p.m. Friday, May 2, 1980	New Orleans, La.	Speak to ABA National Labor Law Institute	NCG
6:15 a.m. Tuesday, May 6, 1980 - 11:30 a.m. Friday, May 9, 1980	St. Louis, Mo.	Spoke to labor law symposium sponsored by Southern Illinois U.	$475.00
	Tampa, Fla.	Visited Regional office Not on travel status May 7	
5:30 p.m. Monday, May 12, 1980 - 4:30 p.m. Thursday, May 15, 1980	Tampa, Fla.	Visited Regional office May 13 and 15 Not on travel status May 14	$292.44

Period of absence from Washington	Place Visited	Reason for Travel	Cost to Government	
9:55 a.m. Monday, June 2, 1980 - 5:00 p.m. Tuesday, June 3, 1980	San Antonio, Texas	Spoke to annual dinner meeting of Texas Association of Business	NCG	
1:59 p.m. Monday, June 16, 1980 - 10:00 p.m. Tuesday, June 17, 1980	Salt Lake City, Utah	Spoke to annual convention of American Society of Personnel Administrators	$12.00	
5:00 p.m. Wednesday, June 18, 1980 - 6:00 p.m. Thursday, June 19, 1980	Boca Raton, Fla.	Spoke to annual convention of Florida Bar Association	NCG	
			$4234.58	FY 1980 total
			$20334.44 grand total	

May 16, 1978

Honorable Orrin G. Hatch
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

In accordance with your May 4, 1978, request to Chairman Fanning, I am furnishing herewith the dates, times, places, costs to the government, and reasons for each trip I have made out of Washington, D.C., since October 25, 1977, when I took the oath of office and assumed my duties as a Member of the National Labor Relations Board.

The context in which you place your request for information relating to travel by Board Members suggests to me a possible misunderstanding of the effect of such travel on the Board Member's principal function — deciding cases. I would hope that you would agree that the activities which the attached data reflect are in themselves a necessary and important part of the functions and duties of a Member of the National Labor Relations Board. It needs to be said, however, that these activities are performed by a Board Member at personal cost to him or her in terms of both money and time. A Board Member's expenses are not fully covered by current government reimbursement policies, and the fact of the matter is that time spent away from the office must be made up through hours spent at home and in the office nights and weekends. In my own case, after a typical 9-hour day at the office, I spend at least two and often four or more hours almost every weekday night working at home on cases, usually take cases with me on trips out of town, and spend a substantial part of Saturdays and Sundays working on cases either at home or at the office. Also, considerable time is spent in telephone contact with my office when I am in travel status.

I make these statements not to elicit sympathy - indeed, I enjoy the challenge and the hard work — but, rather to place in proper context the travelling that Board Members undertake. It would be far easier to turn down all requests to attend meetings and make speeches, but in my opinion to do so would not serve the best interests of the government, the agency, or the general public. Through participation in such activities, Board Members are able to discuss the actions of the agency, the purposes of the statute, and developments in the law, and to achieve better understanding and greater acceptance of them. Indeed, the groups which tender such invitations to Board Members seem to believe this very strongly. I think it fair to state that the management and union lawyers who comprise the ABA committees engaged in some very vigorous arm-twisting to secure the attendance of one or more Board Member at their meetings this year.

I have heard you state publicly your view that "The NLRB is the best agency in government" — your emphasis. In your letter you describe the NLRB as "one of the truly model agencies of government today." I have spent the greater part of my working life in this agency, and I unreservedly agree with you. This reputation was achieved, of course, by the hard work of dedicated public servants at all levels of the agency, from top to bottom, for nearly 43 years now, and the record of excellent performance about which you write is continuing today.

Sincerely,

John C. Truesdale
Board Member

Attachment

The **Chairman**. Are there questions that you wanted to submit for the record?

Senator **Hatch**. Well, let me just ask a couple more questions. Are you under pressure?

Mr. Truesdale, let me do this: As you know, we differ widely on your record at the Board and on a number of cases, on activities, and a variety of other things.

The **Chairman**. You read that dissent with conviction.

Senator **Hatch**. I did. Let us submit to you further questions in writing to save time here today, and you have had 2 long days here and I would be happy to do it that way.

But, Mr. Chairman, in conclusion——

Mr. **Truesdale**. Senator, could I?

Senator **Hatch**. Yes, go ahead.

Mr. **Truesdale**. I would like to take just 5 or 10 minutes for a sentence or two on some of the cases that were mentioned this morning.

Senator **Hatch**. That would be fine with me.

Mr. **Truesdale**. You mentioned E. L. Wiegand. In that particular situation, a strike began, an employee was on sick leave at the time the strike began. The question is: While the strike was in progress, did an employee who was sick continue to get disability benefits? The Board said yes, unless that person demonstrates support for the strike, in which case the disability benefits discontinue.

And in that case, disability benefits were discontinued for a person who expressed support for the strike, although he was unable, for physical reasons, to go back to work.

Senator **Hatch**. Yes, but the prior law was that the employer could force the employee to disavow the strike. That was what was changed, and that's the complaint, is that you are saying that the only person—that the employee can continue to get all the disability benefits even though he supports a strike as long as he doesn't say anything.

Mr. TRUESDALE. But the employee who was unable to return to work because of disability, nevertheless his disability benefits were discontinued in that case because he expressed support for the strike.

Senator HATCH. Well, I agree, but the case basically says that he does no longer have to disavow the strike.

Mr. TRUESDALE. For the reasons given in that decision. I think it's been unclear this morning, in *United Dairy,* that the Supreme Court did establish three categories of cases. In two categories in which bargaining orders might be issued, and one in which an election should be held. And the courts—the third circuit was mentioned this morning—the courts have said that a bargaining order can be issued in the absence of a majority status where outrageous and pervasive unfair labor practices have occurred.

Now, my——

Senator HATCH. Are you saying that the courts have said that or have not said that?

Mr. TRUESDALE. The courts have said that. Senator Williams read that this morning. I don't know if Senator Williams can quickly retrieve it. But in just so many words, the third circuit said that. And many other courts have said that as well.

Now, I was, much more restrictive than that in *United Dairy*—that's why I said the chamber stood *United Dairy* on its head.

The CHAIRMAN. We have it.

Senator HATCH. Well, I happen to believe that the Supreme Court case would be the lead case, and that case says otherwise. That case refutes your language that the act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support.

Mr. TRUESDALE. Who said that?

Senator HATCH. You said that.

Mr. TRUESDALE. The Supreme Court said it.

Senator HATCH. No, the Supreme Court didn't say that; you said that.

The CHAIRMAN. Here's the way the third circuit put it. "It is by now a familiar refrain that the *Gissel* court posted a tripartite categorization of unfair labor practices for considering the issuance of bargaining orders without requiring elections.

"First, in exceptional cases marked by outrageous and pervasive unfair labor practices which eliminate the possibility of holding a fair election, a bargaining order may issue even without a showing that the union at one point had a card majority."

That's from the third circuit, going back to the Supreme Court for its authority.

Mr. TRUESDALE. My decision in United Dairy was much more restrictive than that statement from the third circuit. I felt that in the light of the principle of majority rule embedded in the statute, that a bargaining order ought not to be entered in that case.

And in 10 or 12 cases since that time, I have held to that position.

So somehow to have this thing turned around and say that whereas I said less than the courts have said, that that somehow predicts things to come, amazes me.

The thing to look at is: what have I done in these cases? What I have done in these cases is that in 10 or 12 cases I have not entered a bargaining order? In one, in *Lundry*, I think, the administrative law judge says: if it is ever to be done, it will be done here—but in *Lundry*, the case the NAM refers to, I did not enter a bargaining order in that case.

Senator HATCH. Are there any circumstances you can see that would dictate the issuance of a bargaining order without the showing of a majority——

Mr. TRUESDALE. The only thing that we can do, Senator, is to look at the cases I have decided. That issue has not been absolutely squarely presented, and I don't think it is appropriate for me to sit here and decide future cases. But you can look at the cases I have decided—every one that has come to the Board, I have not entered a bargaining order. And my vote not to do so has been the swing vote at the Board.

The CHAIRMAN. I think Professor Goldberg hypothesized the situation that might bring it closer to the reality, didn't he, with the 49 percent? And then the vicious employer activity killed it right there. That was Goldberg—that was not the Court, was not the Board.

Senator HATCH. Do you think that the Board has the legal capacity to issue a bargaining order in the absence of a prior showing of majority support?

Mr. TRUESDALE. I say it may, which is less than the courts have said.

Senator HATCH. Do you think it is a possibility that the Board does have that capacity?

Mr. TRUESDALE. It is less than the courts have said.

Senator HATCH. I disagree with that. I don't know——

The CHAIRMAN. You do or do not disagree?

Senator HATCH. I disagree with his statement. I disagree with the third circuit, if that is in fact what it said, because the *Gissel Packing* case was an exceptional case which was marked by outrageous and pervasive unfair labor practices.

Mr. TRUESDALE. That's all we are talking about.

Senator HATCH. Now, wait. Basically, the case said the Board's remedial authority, under section 10(c) of the act, may well encompass the authority to issue a bargaining order in the absence of—let's see, excuse me, this is your case, I was quoting your language.

But in that case they held that another secret-ballot election was ordered, because that is less destructive to the act's purposes than imposing a union upon employees without some history of majority support for the union.

Mr. TRUESDALE. Sounds like you are quoting from my decision.

Senator HATCH. I thought that was the *Gissel* decision, but I may have——

Mr. TRUESDALE. That is my decision; that happens to be my view.

Senator HATCH. I don't have *Gissel* with me, but I will look it up and spend some time on it. But my understanding was that there is no way that a bargaining order can issue, according to *Gissel*, in the absence of a prior showing of majority support.

But both of us better look that up, because——

The CHAIRMAN. I think we are going to have to have the pertinent language of the *Gissel* case.

Senator HATCH. Well, I know one thing *Gissel* did.

The CHAIRMAN. And put that in the record.

[The material referred to follows:]

* * * * *

[BARGAINING ORDER]

C. Remaining before us is the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. See NLRB v. Katz, 369 U.S. 736, 748, n. 16. 50 LRRM 2177 (1962); NLRB v. P. Lorillard Co., 314 U.S. 512, 9 LRRM 410 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered. Franks Bros. Co. v. NLRB, 321 U.S. 702, 14 LRRM 591 (1943). We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," Franks Bros., *supra*, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; [30] and any election held under these circumstances would not be likely to demonstrate the employees true, undistorted desires.[31]

The employers argue that the Board has ample remedies, over and above the cease-and-desist order, to control employer misconduct. The Board can, they assert, direct the companies to mail notices to employees, to read notices to employees during working time at the plant, or it can seek a court injunctive order under § 10(j) (29 U.S.C. § 160(j) (1964 ed.)) as a last resort. In view of the Board's power, they conclude, the bargaining order is an unnecessarily harsh remedy that needlessly prejudices employees' § 7 rights solely for the purpose of punishing or restraining an employer. Such an argument ignores that a bargaining order is designed as much to remedy past election damage[32] as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[33] There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition. For, as we pointed out long ago, in finding that a bargaining order involved no "injustice to employees who may wish to substitute for the particular union some other . . . arrangement," a bargaining relationship "once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed," after which the "Board may. . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." Frank Bros, *supra*, at 705-706.

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[30] The Board indicates here that its records show that in the period between January and June 1968, the median time between the filing of an unfair labor practice charge and a Board decision in a contested case was 388 days. But the employer can do more than just put off his bargaining obligation by seeking to slow down the Board's administrative processes. He can also affect the outcome of a rerun election by delaying tactics, for figures show that the longer the time between a tainted election and a rerun, the lesser are the union's chances of reversing the outcome of the first election. See n. 31, *infra*.

[31] A study of 20,153 elections held between 1960 and 1962 shows that in over two-thirds of the cases, the party who caused the election to be set aside won in the rerun election. See D. Pollitt, NLRB Re-Run Elections: A Study, 41 N. C. L. Rev. 209, 212 (1963). The study shows further that certain unfair labor practices are more effective to destroy election conditions for a longer period of time than others. For instance, in cases involving threats to close or transfer plant operations, the union won the rerun only 29% of the time, while threats to eliminate benefits or refuse to deal with the union if elected seemed less irremediable with the union winning the rerun 75% of the time. Id., at 215-216. Finally, time appears to be a factor. The figures suggest that if a rerun is held too soon after the election before the effects of the unfair labor practices have worn off, or too long after the election when interest in the union may have waned, the chances for a changed result occurring are not as good as they are if the rerun is held sometime in between those periods. Thus, the study showed that if the rerun is held within 30 days of the election or over nine months after, the chances that a different result will occur are only one in five; when the rerun is held within 30-60 days after the election, the chances for a changed result are two in five.

Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a determination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." NLRB v. Logan Packing Co., 386 F.2d 562, 570, 66 LRRM 2596 (C. A. 4th Cir. 1967); see also NLRB v. Heck's *supra*, 398 F.2d, at 338, 68 LRRM 2638. The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a § 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See, e.g., United Steelworkers of America v. NLRB, 376 F.2d 770, 64 LRRM 2650 (C. A. D. C. Cir. 1967); J. C. Penney Co., Inc. v. NLRB, 384 F.2d 479, 485-486, 66 LRRM 2069 (C. A. 10th Cir. 1967).

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[32] The employers argue that the Fourth Circuit correctly observed that, "in the great majority of cases, a cease and desist order with the posting of appropriate notices will eliminate any undue influences upon employees voting in the security of anonymity." NLRB v. Logan Packing Co., *supra*, at 570. It is for the Board and not the courts, however, to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U. S. C. § 160(c) (1964 ed.)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See Fibreboard Paper Products Corp. v. NLRB, 379 U. S. 203, 57 LRRM 2609 (1964). "[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." Consolo v. FMC, 383 U. S. 607, 621 (1966).

[33] It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election, and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. See Lesnick, *supra*, at 862. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." D. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 135 (1964).

Senator Hatch. *Gissel* said that the Board found that the union had obtained valid authorization cards from a majority of employees in the union.

Mr. Truesdale. Exactly.

Senator Hatch. And in this particular case, the *United Dairy* case, there was no evidence of majority support there at all.

Mr. Truesdale. That is why I declined to enter a bargaining order and have also declined in the 10 or 12 other cases in which the issue arose.

Senator Hatch. I will review that case again and make sure that the criticism by the chamber is valid criticism on that point.

Mr. Truesdale. I would like to point out that in *Henry C. Beck*, to which Senator Hatch referred this morning, we reversed *Lein-Steenberg*. The first two cases issued by the Board on that point, of which one was *Lein-Steenberg*, both were denied enforcement by the courts, one by the seventh circuit and one by the District of Columbia circuit. Therefore, when I came to the Board, we were faced with these adverse court decisions, we were faced with an outcry from the Hill that the Board had not faithfully reflected the terms of the statute.

So perhaps I came at a fortunate time when I had the advantage of the hindsight of those adverse court decisions, but I agreed with the courts and followed the decisions of the seventh circuit and the District of Columbia circuit on that area of the law. The prior cases, which we overruled, had been denied enforcement by the courts.

Amoco, to which Senator Hatch referred this morning, I must say that I have to beg off on that one, because *Amoco* itself, the very case you mentioned, is back before the Board now on remand from the fifth circuit. And I think it would probably be inappropriate for me to comment on it. I would say only that it presents the very difficult issue of whether what is involved is a change in representation or just a change in affiliation.

Reference was made this morning by someone that there were too many wildcat strikes in the country, and I would like to put into the record, with the permission of the committee, a speech that I made last year in Dallas on the importance of adherence to contracts, and particularly on the importance of living up to agreements, including no-strike clauses. This speech, I think, says it much better than I could say it now, and since a number of other speeches have been put into the record—and I would like, if you would, that this be included.

The Chairman. It certainly will be.

Mr. Truesdale. That concludes the miscellaneous comments that I had to make. I would be glad to answer any further questions.

The Chairman. You have answered all of my questions, I believe. I will make my observation that you have very completely and in a most enlightening way responded to the things that should be addressed, having been raised during this hearing. I applaud your presentation here of yourself and your views. And I certainly hope that we will be able to, on our meeting that will be scheduled for about 2 weeks, favorably report you to the Senate, where I hope 60 of our Members will feel as I do, that it is important to our country that you be in this position.

Mr. Truesdale. Just as a last remark, I would like to say I appreciate very much the courteous reception that I have had from the committee. The committee fulfills a very valuable constitutional function in reviewing the President's nominations, of preparing to give the advice and consent of the Senate—extremely important. And I appreciate very much the opportunity that I have had to come here to answer questions. I feel no ill will against anyone who is opposing my nomination. I do feel that a fair look at the complete body of my decisions will show that I have been an evenhanded Board member. I could take decisions out of those 2,500 cases that would bring the unions up here opposing me. The chamber might feel that I have been antibusiness. I think that I am not antibusiness, I am not prounion; I am, to use that time-worn cliche, prostatute.

And I think that is what my decisions will show.

The Chairman. I think that should come through; it comes through very clearly, I am sure. And I hope that enough will see this to appreciate just that.

Senator Hatch. Mr. Truesdale, as you know, I have a great number of questions for you. As I have said, in the interests of time here today, we will submit those in writing and we will try to have them in the mail to you today or tomorrow so that you will have within these next 2 weeks the privilege of answering all of them.

We appreciate that this is not an easy situation nor an easy task for anybody; it's a tedious ordeal—and we appreciate your patience and your being here.

The Chairman. I hope that the questions can be presented, Orrin, so that the answers can be in by the 10th.

Senator Hatch. We will have them prepared and in the mail today.

The Chairman. We would like to have all of this for the record to be closed on the 10th.

[The questions referred to and additional material submitted for the record follow:]

NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

September 10, 1980

Honorable Harrison A. Williams
Chairman, Senate Committee on Labor
and Human Resources
United States Senate
Washington, D. C.

Dear Senator Williams:

On September 5, 1980, following the close of the hearing on the President's nomination of me for reappoint- to a full term on the National Labor Relations Board, Senator Orrin G. Hatch submitted a number of questions to me involving my disposition of certain issues which had come before the Board. Senator Hatch requested that I submit my responses before the deadline for receipt of such information for the Record. I understand that that deadline is today, and I attach herewith a copy of Senator Hatch's questions and my responses for the Record.

Please let me know if I can be of further help to you.

Sincerely yours,

John Truesdale

John C. Truesdale

cc: Honorable Orrin G. Hatch

SUBJECT: Response to Truesdale's Response to
Sen. Hatch's First Question Dealing
With the Board's Jurisdiction

1. During our first hearing, I asked you why you felt it necessary to assert jurisdiction over small, noncommercial charitable enterprises within our society as these organizations have only a de minimus impact on interstate commerce. I asked this question because of the concerns that you have expressed over the Board's increasing caseload. In your statement to this Committee, you made the following observations:

> We need to pay more attention to ways and means of coping with growing case loads without sacrificing quality, a task made all the more difficult at a time when governmental fiscal austerity is a necessity.
>
> Current criticisms include the charge that the Board does not sufficiently articulate its decisions. . . . In large part, the problem is a function of the Board's increasing case load. In my three years on the Board, I have participated in approximately 2,500 published decisions, and many hundreds of other case actions--rulings on requests for review and various motions, unpublished decisions, and so forth. Too often, there simply is not time to give each case the scrutiny that earlier Boards could give. A complicating factor is the fact that the agency as a whole, like other federal agencies, must decrease its staff under the current hiring freeze, thereby reducing the available hands to write the articulation of Board rationale.

You concluded, Mr. Truesdale, that:

> In these stringent circumstances, the agency must turn its attention to steps that will improve our ability to decide and issue cases with as much speed as is consonant with a fair consideration of the merits.

One step which to me would seem self-evident would be for the Board to decline jurisdiction over cases, such as the ones I described two weeks ago, that do not have a substantial effect on interstate commerce. You indicated in your response, however, that Section 14(c)(1) of the Act, 29 U.S.C. § 164(c), "removed our ability" to change the Board's jurisdictional standards. Because a thorough understanding of the Board's jurisdictional authority would seem to be a basic requirement for appointment to the position of Board member, I am troubled by your conclusion for the following reasons.

Section 14(c)(1) provides that:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion

> of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (Emphasis added).

In other words, Congress has given the NLRB discretion to decline jurisdiction over labor disputes involving a particular class or category of employers that do not have a sufficiently substantial effect on interstate commerce to warrant exercise of the Board's jurisdiction.

The subsection, which was enacted in 1959 as part of the Landrum-Griffin Act, explicitly approved the Board's longstanding practice of using some discretion in choosing the classes of employers over which it would exercise jurisdiction. See El Dorado Club, 151 NLRB 579, 581 (1965). As Judge Fahy, who you referred to in your opening statement, stated in Leedom v. Fitch Sanitarium, Inc., 294 F.2d 251, 254 (D.C. Cir. 1961), "the commerce power is a standard of permissible jurisdiction, not one for the mandatory assertion of jurisdiction."

Section 14(c)(1) also contains a proviso forbidding the Board from making its jurisdictional standards more stringent than they were on August 1, 1959. The provision, however, does not mandate that the Board must take jurisdiction over any category or class of employers meeting its dollar volume standards in effect on August 1, 1959. Nor does it require the Board to take jurisdiction over employer categories which it had not asserted jurisdiction prior to that date. According to the D.C. Circuit:

> "Unless the Board prior to that date had established a jurisdictional standard affirmatively including the class or category here involved, it was free to withhold the exercise of its authority. . ." Hirsch v. McCulloch, 303 F.2d 208, 212 (D.C. Cir. 1962).

In fact, even with respect to a particular type of employer which the Board exercised its jurisdiction prior to 1959 Judge Fahey tells us that a prior exercise of jurisdiction does not constitute a "prevailing standard" under the terms of Section 14(c). In his opinion in Leedom, he emphasized that because the commerce power standard of jurisdiction is a permissible standard, the Board's "non-retail" jurisdictional standards were not intended to be inclusive of all enterprises of a non-retail character. Judge Fahey said such an interpretation not only would be inconsistent with the purpose of Section 14, it "would unduly restrict the area of Board discretion under Section 14 in situations where the effect of a labor dispute on commerce is found by the Board to be insubstantial." His concluding sentence, Mr. Truesdale, deserves careful consideration:

> Such a restriction upon the Board's discretion would defeat the legislative intent embodied in the 1959 amendments.

Thus to say that Section 14(c)(1) has removed the Board's ability to decline jurisdiction over noncommercial charitable enterprises that have practically no impact on interstate commerce is simply a misstatement of the law.

Indeed, even the Board's own procedural regulations (Section 103) governing jurisdictional standards over colleges, universities, and symphony orchestras state that it is "well established that the Board in its discretion may set boundaries on the exercise of that authority. The justification for a selective approach to jurisdictional questions, according to the regulations, is articulated in the position which the Board has, until now, consistently take:

> that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce.

You have chosen, however, to assert jurisdiction over labor disputes that do not have a pronounced impact on interstate commerce even though, as you have admitted, to do so has adversely affected the quality of the Board's decisions. In fact, from our review of your decisions, we do not recall a single jurisdictional case which came before you during your term as Board member in which you voted to decline jurisdiction. Could you please state for the record whether you have ever voted to decline jurisdiction in cases coming before the Board on the question of whether jurisdiction should be granted.

First, let me say that the thrust of my remarks at my initial hearing before this committee, with regard to the assertion of jurisdiction over certain charitable institutions, was that those institutions which meet our jurisdictional standards do affect commerce. I then went on to explain that, given the impact of such institutions on commerce, the Board will not decline to assert jurisdiction over them simply because the Board desired to restrict its operations. I also observed that there has been no groundswell of support, in either labor or management camps, for upward revisions in the Board's jurisdictional standards, which are themselves grounded on an evaluation of an employer's impact on commerce. From there, my recollection is that you and I discussed the effect of Section 14(c) on any proposal for such a change, if one were made.

Let me put your question concerning assertion of jurisdiction over small employers in perspective. I think I should begin by explaining the history of the Board's assertion of jurisdiction over eleemosynary institutions, because Congressional action in 1974 made it necessary for the Board to reconsider its approach in this area.

In Ming Quong Children's Center, 210 NLRB 899 (1974), the Board declined jurisdiction over nonprofit institutions whose activities were primarily noncommercial in nature and intimately connected with the charitable purposes of the institution. The theory underlying that decision was that the Board had the authority to decline jurisdiction over a class of employers by virtue of the nature of the employers, without examining the impact of an organization's activities upon interstate commerce. The Board specifically noted that, where a particular non-profit institution had a ''massive impact on interstate commerce,'' as in Cornell University, 183 NLRB 329 (1970), the Board had asserted jurisdiction. However, Ming Quong specifically overruled prior Board precedent in which the Board had asserted jurisdiction over such institutions as nonprofit homes for troubled children. The Board's Ming Quong decision was avowedly a change in policy. Indeed, it represented a change in position for then-Chairman Miller and Member Kennedy, who previously had voted to assert jurisdiction over similar employers.

Ming Quong issued in May 1974. On August 26, 1974, the Health Care Amendments became effective. The enactment of these amendments, which added new classes of employers to the Board's jurisdiction, made it necessary for the Board to reexamine its policies concerning the assertion of jurisdiction in light of newly expressed Congressional intent.

Two years after Ming Quong, in St. Aloysius Home, 224 NLRB 1344 (1976), the Board announced the results of its deliberations in this area. By this time, Chairman Miller had been replaced by Chairman Murphy, and Member Walther had assumed Member Kennedy's seat. Then-Member Fanning, who had dissented in Ming Quong, and Member Jenkins, who had participated in some of the earlier Board decisions overruled in Ming Quong, remained on the Board. As it turned out, Member Walther's vote was determinative in this area.

St. Aloysius reviewed the Board's Ming Quong decision as well as the effect of the 1974 Health Care Amendments. Because those amendments deleted the only reference in the Act concerning exclusion of charitable organizations--that is, the one referring to nonprofit hospitals--the Board majority concluded that there was no longer a statutory basis for declining jurisdiction over nonprofit organizations simply because of their charitable function or ''worthy purpose.'' The Board majority found no logical distinction between ''worthy purpose'' nonprofit hospitals, over which the Board was specifically directed to take jurisdiction, and other ''worthy purpose'' institutions. The Board then turned its inquiry to the specific employer in St. Aloysius to determine whether its activities had a sufficient impact on interstate commerce to warrant assertion of jurisdiction. As there remained no statutory distinction between profit and nonprofit institutions, the Board found it appropriate to apply its normal jurisdictional standards for employers engaged in the same business activities regardless of their charitable or noncharitable status.[1] Then-Chairman Murphy and Member Penello dissented, as they read Congressional intent differently.

Thus, when I came to the Board upon Member Walther's resignation, the remaining Board Members were evenly divided concerning the implications of the Congressional enactment of amendments bringing certain nonprofit institutions within our jurisdiction. I agreed with the St. Aloysius majority's holding that the sole test for asserting jurisdiction should be the impact of an employer's operations on commerce rather than the worthwhile goals of the employer.

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[1] It may be useful to note that during this same period of time Congressional concern over the activities of various not-for-profit organizations, including charitable foundations, and particularly over the impact of such institutions on commerce, resulted in the passage of stringent tax legislation affecting these organizations.

It is my opinion that the charitable institutions over which the Board has asserted jurisdiction since St. Aloysius had a pronounced impact on interstate commerce. In order for jurisdiction to have been asserted, an employer must have had sufficient revenues and interstate transactions to meet the jurisdictional standards which the Board has found to have an impact on commerce. Given this impact, it would be contrary to Congressional intent, as expressed in Section 14(c)(1) and the 1974 Health Care Amendments, to decline to assert jurisdiction over them merely because the Board has limited resources. Congress has spoken, and we must find a way within our limited resources to accommodate cases involving these employers.

Let me put it another way. Section 14(c)(1) gives the Board discretion to decline to assert jurisdiction where the Board believes the impact on commerce is insubstantial. This is not the same thing as authority to decline to assert jurisdiction where the impact is substantial but the Board wants to cut its case intake. Instead, it merely authorizes us to decide that some employers have no substantial impact on commerce. That determination is made in the way the Board has always made such a determination--through an examination of the flow of goods and services across state lines and the revenues of the employer. I believe the intent behind the proviso to 14(c)(1) was to prevent the Board from redefining ''substantial'' in a manner detrimental to employees who enjoyed the protection of the Act. This belief is based on the arguments surrounding the Board's voluntary limitation of its jurisdiction to less than every case which technically comes within the purview of the Act. The Supreme Court held in N.L.R.B. v. Fainblatt, 306 U.S. 601 (1939), that the Board's jurisdiction extends to all conduct which might constitutionally be regulated under the commerce clause, subject only to the rule of de minimis. Notwithstanding this very broad authority, the Board early decided to devote its resources only to cases where the impact on commerce was substantial, a practice approved by the Supreme Court in Polish National Alliance v. N.L.R.B., 322 U.S. 643 (1944). Initially, the Board considered each employer on a case-by-case basis. In 1950, the Board for the first time established minimum standards for assertion of jurisdiction to concentrate its efforts on employers with a pronounced impact on interstate commerce. The Board revised its standards---expressed largely in terms of annual inflow and outflow of interstate products or services---in 1953 and 1958. Each of these revisions increased the minimum dollar amounts for the Board to assert jurisdiction, and thus further limited the Board's jurisdiction. This trend was ended with the enactment of Section 14(c) in 1959. It appears that this result was intended by Congress, which may have been concerned that the Board would unduly narrow its own jurisdiction.

Let me summarize the restrictions within which I have made my decisions. By Congressional enactment, my colleagues and I may not revise upward those jurisdictional standards which were in effect in 1959. Thus, so long as an employer has more than de minimis interstate dealings and meets our higher-than-de minimis discretionary standards, we must assert jurisdiction. Further, the Board may assert jurisdiction over an employer which, although meeting the de minimis standard, does not meet our discretionary standards. We exercise this discretion very rarely, usually when it is necessary to protect our own processes. An example of this, before my term began, is Pickle Bill's Inc., 224 NLRB 413 (1976), where the Board asserted jurisdiction over an employer whose involvement in interstate commerce was more than de minimis but whose gross revenues did not meet our discretionary standards. However, in that case the Board limited its exercise of jurisdiction to remedying the discharge of employees which occurred in retaliation for testifying in a Board proceeding.

A typical case where the Board has declined to assert jurisdiction over an employer engaged in commerce whose operations did not meet our discretionary standards is R. J. Causey Construction Company, 238 NLRB No. 7 (1978), where Members Penello and Murphy and I affirmed an administrative law judge's dismissal of a complaint because the employer's operations did not come within our discretionary standards. Finally, of course, the Board may not assert jurisdiction where the employer's operations do not meet the de minimis test, even if it otherwise meets our discretionary standards.

The result of these constraints is that the Board very rarely itself decides whether to assert jurisdiction over a particular employer. Our regional offices are aware of our jurisdictional standards and apply them in deciding whether to direct an election, issue a complaint, or take other action. The cases involving charitable institutions which you mention in your question all concerned employers whose operations met both the constitutional _de minimis_ standard and our own discretionary standards. Thus, as I have noted before, it is inaccurate to say that those employers had no pronounced impact on interstate commerce; they had as much impact as many other enterprises over which we assert jurisdiction.

Turning now to your question, I have mentioned one case, _R. J. Causey Construction_, in which I voted with Members Penello and Murphy not to assert jurisdiction over an employer. Other cases in which I have voted to decline jurisdiction include _Nordstrom's Ambulance Service_, 251 NLRB No. 137 (1980), and _Community Health and Home Co._, 251 NLRB No. 95 (1980). Doubtless there are others as well, but these come to mind.

2. I want to now focus on one of your jurisdictional decisions in particular. In The Singer Company-Detroit Job Corps Center, 240 NLRB No. 130 (1979), you decided to assert jurisdiction over an employer who operated a residential Job Corps Center under a contract with the Labor Department. In doing so,

you joined with Chairman Fanning and Member Jenkins to expressly overrule a prior Board decision respecting Job Corps centers -- Teledyne Economic Development Company, 223 NLRB 1040 (1976). Apparently, you feel that the Board's caseload is such that bringing all Job Corps under your jurisdiction will not have a harmful effect on the ability of the agency to handle those cases involving employees who actually do have an impact on interstate commerce.

According to Members Penello and Murphy who dissented, the employer was prohibited by contract from making any "binding commitments without prior DOL approval or, on some minor matters, DOL acquiescence." The dissenting members, therefore, would deny jurisdiction because the employer shares the Labor Department's exemption from the Board's jurisdiction.

Perhaps you could explain for me how an employer who is barred from making any binding commitments with its employees does not, as you stated, make the employer "incapable of bargaining collectively with a representative of its employees?"

One of the interesting things about the Singer decision is that it was not the first case in which the Board asserted jurisdiction over Job Corps centers. Actually, until the mid-seventies, the Board routinely asserted jurisdiction over Job Corps centers, and those employers did not question the Board's jurisdiction. Examples of such cases are Federal Electric Corp., 162 NLRB 512 (1966), and Training Corp. of America, 162 NLRB 286 (1966). Teledyne was the first case in which the employer suggested that Job Corps centers were not subject to the Board's jurisdiction, and even after Teledyne one Job Corps center successfully sought an advisory opinion from the Board finding that the employer's operations were subject to the Board's jurisdiction. That case was American Technical Assistance Corp., 224 NLRB 959 (1976), and the practical effect of that advisory opinion was to prevent the New York State Labor Relations Board from considering unfair labor practice charges filed with that agency.

With this background in mind, let us look at Singer. While the dissenters in that case argued that the employer could not bargain effectively, the record showed otherwise. Indeed, this very employer had bargained effectively with a Board-certified unit of food service employees for three years prior to the time this case came before the Board. The employer had not submitted its contract with those employees to the Department of Labor (DOL), the agency with responsibility for oversight of the employer's operations, because the contracts reached with the food service employees fit within the broad outlines of the employer's contract with DOL.

It is interesting to note that the DOL filed an amicus brief in Singer in which it urged the Board to assert jurisdiction. Indeed, the DOL's brief mentioned most of the factors ultimately relied on by the Board in asserting jurisdiction. Among other things, the DOL brief pointed out that DOL regulations published at 29 CFR §97a.110-113 required Job Corps centers to ''establish labor management relations . . . in accordance with the provisions of the National Labor Relations Act . . . .'' DOL was prohibited by its own regulations from intervening in labor disputes involving Job Corps employees. Under its contract with DOL, the employer was free to hire, fire, promote, demote, and transfer employees; to establish terms and conditions of employment; and, if it so chose, to agree or disagree with union proposals on such traditional bargaining matters as seniority, job bidding, progressive discipline, or grievance procedures, some of which the employer in fact had instituted without prior DOL approval. The majority decision in Singer sets out in greater detail the specific limitations on the employer's discretion, as well as the basis for our conclusion that those limitations were not so pervasive as to preclude meaningful good faith bargaining.

You suggest that Job Corps centers do not have an impact on interstate commerce. That was not an issue in the Singer case, as the parties stipulated that the employer was engaged in interstate commerce and met the Board's standards for assertion of jurisdiction. The primary issue was that alluded to by the dissenters--that is, whether the employer was capable of bargaining with the union. The majority concluded that bargaining was possible, and the dissenters disagreed. That is the sort of factual judgment over which reasonable persons can differ.

Finally, you imply that the employer in Singer was incapable of making binding commitments. While the dissenters may have suggested that this was the case, the fact that the employer had made binding commitments with its food service employees indicated to the majority that the dissent was wrong. Because the employer could and had made binding commitments, it was evident that collective bargaining continued to be possible.

3. Don't you feel, Mr. Truesdale, that the NLRB has some responsibility to establish priorities in order to insure that the more significant cases are handled properly?

Unquestionably the Board must establish priorities to insure that cases are handled efficiently and effectively. However, our ability to do so is severely circumscribed. In my response to the first question of this series, I described the constraints placed on any voluntary retrenching of our jurisdiction. As our industrial society becomes more complex, with ever greater numbers of employers and greater knowledgeability on the part of employees concerning their rights, we have no authority to limit our workload by declining to assert jurisdiction over enterprises of the magnitude which we previously would have included within our jurisdictional standards. The parties before us would seek court review and redress under 14(c).

Given these limitations, we have two principal means of coping with our growing caseload. The first is to do what we can to improve our case processing procedures. In my opening statement to this Committee, I mentioned this as a necessary step. The Board continues to seek out ways of applying modern technology to our work. Even fairly minor innovations, such as computerized typing to eliminate the need for repetitive proofreading of documents, can have an impact. But technology can only go so far in speeding our casehandling. To the extent that Congress adds more enterprises to our jurisdictional package--as it did in the 1974 Health Care Amendments--I believe the Board is justified in requesting a commensurate allocation of further resources to insure the prompt and effective processing of the additional cases such a move entails. Moreover, even if Congress were to make no further changes in our authority, the growth of our working-age population by itself will increase the potential number of case filings. Further, in my years with this agency I have seen growing sophistication in the labor bar which results in the presentation of extremely subtle issues in growing numbers. Greater subtlety in legal arguments requires reexamination of even well-established precedents, a task that can only be performed by the Board Members and the attorneys who assist them. Finally, even if our case load remained the same, any lengthy continuation of the current hiring restrictions would inevitably result in fewer employees to process our continuing caseload.

I do not think our case handling difficulties can be resolved by some attempt at identifying ''more significant'' cases. If you are asking whether we should give short shrift to cases involving all but the very largest employers, my answer is no. The size of an employer is not an accurate indicator of the significance of the legal issue, so long as the employer fits within our jurisdictional standards. Nor can we forget that to the particular employee involved in a case that comes before the Board, the vindication of his statutory right is important whether his employer be large or small. Further, as I indicated in my earlier testimony, employers seek redress for union unfair labor practices as well, and the Board has the duty to give full consideration to the cases brought to us by smaller as well as larger employers.

4. In researching the several hundred decisions in which you have participated, we do not recall any case in which you declined to assert jurisdiction over a small business. Have you ever participated in such a case?

In my response to your first question, I mentioned three cases in which I voted to decline to assert jurisdiction. Two cases involved an employer whose operations did not meet our discretionary standards. In my view, those employers were small employers. Therefore, my answer to your question must be that I have declined to assert jurisdiction over small businesses.

Your question points up what appears to be somewhat of a misunderstanding concerning the stage at which questions like this are considered. As I mentioned earlier, the Board's jurisdictional standards are clear, and thus most cases involving small employers do not go beyond our regional offices. Where an employer meets our discretionary standards, no one on the Board has the authority to ignore Section 14(c) and decline to assert jurisdiction, even if the employer's operations are relatively small, so long as the amount of interstate commerce is more than de minimis. A wealth of Supreme Court cases under the Commerce Clause illustrate the Court's view that it takes very little commerce to meet the de minimis standard. I haven't been on many cases that presented the issue because these questions were largely answered long before I began my term as a Member, through the promulgation of our discretionary standards, and because these cases are usually disposed of in the regional offices.

5. When does the Board plan to modernize its 22-year old jurisdiction standards?

1/ The Singer Company - Detroit Job Corps Center, 240 NLRB No. 130 (1979).

2/ The Salvation Army of Mass; Dorchester Day Care Center and District 65, Distributive Workers of America, 247 NLRB No. 62 (1980).

3/ Evergreen Legal Services and Washington Legal Workers, 240 NLRB No. 146 (1980).

4/ Community Services Planning Council/Area 4 Agency On Aging and Service Employees International Union Local 22, AFL-CIO, 243 NLRB No. 122 (1979).

5/ Roman Catholic Diocese of Brooklyn, Henry M. Hold Association, Bishop Ford Central Catholic High School and Lay Faculty Association, Local 1261, American Federation of Teachers, 243 NLRB No. 24 (1979).

6/ D. T. Watson Home for Crippled CHildren and District 1199P, National Union of Hospital and Health Care Employees, 242 NLRB No. 187 (1979).

7/ Richboro Community Mental Health Council, Inc. and District 1199, National Union of Hospital and Health Care Employees, 242 NLRB No. 174 (1979).

8/ ANKH Services, Inc., and Local 50, Service Employees International Union, 243 NLRB No. 68 (1979).

9/ The Krebs School Foundation, Inc., and Local 925, Service Employers International Union, 243 NLRB No. 79 (1979).

10/ United Services for the Handicapped and Retail Clerks International Union, Local 698, 239 NLRB No. 140 (1978).

11/ Mon Valley United Health Services, Inc., and Pennsylvania Social Services Union, Local 668, SEIU, 238 NLRB No. 129 (1978).

12/ Chicago Youth Centers and Local 372, SEIU, 235 NLRB No. 126 (1978).

13/ Forty-Fourth Annual Report on the National Labor Relations Board for the Fiscal Year Ended September 30 (1979), As I have mentioned in answering previous questions, it is my opinion that Section 14(c) circumscribes the Board's ability to raise its jurisdictional ''floor'' above that in existence in 1959. I retain an open mind to arguments concerning the options available to the Board in this regard. However, as I indicated in my initial testimony before this Committee, I am unaware of any urging, from unions or employres, that the Board revise its jurisdictional standards up or down as inflation ebbs and flows.

REVISING 30-YEAR OLD PRECEDENT GOVERNING STRIKER BACKPAY

Your decision in Abilities and Goodwill, Inc., 241 NLRB No. 5 (1979) is of particular concern. At the outset I would point out that the employer in this case was engaged in a charitable, nonprofit, essentially noncommercial activity. It was established to provide services for mentally, emotionally and physically handicapped individuals in the State of Maine. According to the current Board majority, however, disruptions of the free flow of interstate commerce caused by "industrial strife" emanating from organizations like Goodwill necessitates that the Board assert its jurisdiction.

Turning to the merits of the case, for the thirty years preceding Abilities and Goodwill the rule on striker back pay was clear. Unlawfully discharged working employees were eligible for backpay from the date of their discharge, but unlawfully discharged striking employees were eligible for backpay only after an unconditional offer to return to work or, where there is evidence that any such offer would be futile, after the general abandonment of the strike. Suddenly last year, however, you, together with Chairman Fanning and Jenkins, decided to reverse this rule. You stated that "no logical reason" presents itself for treating an employee who is discharged while on strike differently from an employee who is unlawfully discharged while working. With one stroke of the pen, Mr. Truesdale, you and your bretheren have thrown out 30 years of Board precedent as illogical. Now, I have never claimed to have either the expertise or the practical working knowledge of the Labor Act that members of the National Labor Relations Board are said to have, but I can tell the difference between someone who is working and someone who is not. Members Murphy and Penello who dissented in the decision made a vain attempt to explain the difference to you. They said:

> Employees who are working at the time of their discriminatory discharge are performing services for their employer in exchange for wages and other benefits.
>
> In contrast, employees who are on strike at the time of their discriminatory discharge are voluntarily withholding services from their employer and are not entitled to compensation.

You found this reasoning unpersuasive, however. Expressly overruling a precedent established in 1948, you held that an unlawfully discharged striker should be treated as if the individual were actually at work when discharged. You stated that such strikers will no longer be required to request reinstatement unconditionally in order to trigger the employer's back pay liability.

Now, I have never condoned illegal discharges. Neither do I condone, however, a ruling that forces an employer as a penalty for his error to compensate those employees who refuse to work. The NLRA as enacted by the Congress is intended to be remedial not punitive.

As a practical matter, your rule compels the employer to prove an unlawfully discharged striking employee's continued support of the strike even though such allegiance can only be proved by the striker himself in most instances. Moreover, as stated by the dissent, the majority has nonetheless compounded their error by:

> failing to give weight to the Board's considerable practical experience with the policy predicated on such a distinction. Their disregard for administrative experience is in marked contrast to the Board's custom of justifying the modification overruling of an established remedial policy by reference to a "cumulative experience" which has revealed the particular shortcomings of that policy. It may also render liable to sharp judicial scrutiny a remedial determination by the Board which, if reflective of our peculiar administrative expertise, would ordinarily receive considerable deference upon review by the courts.

Questions

1. Please detail for the record how you came to the conclusion that the majority of those serving on the Board for the 30 years prior to your appointment were so consistently unable to make a logical decision regarding striker back pay?

As I explained at the hearing on September 5, Abilities and Goodwill does not require an employer to finance a strike against itself. Abilities and Goodwill involved the extent of an employer's backpay liability for unlawfully discharging employees while on strike. As with most questions of remedy, this is an issue which involves competing interests but one which must be resolved with an overriding awareness of the principal purpose of the Act - the protection of employee rights. The employer in Abilities and Goodwill ignored these rights by summarily and, in the Board's view, unlawfully discharging 23 striking employees. Following their discharge, the employees never returned to the employer's premises. The Board was then faced with the difficult question of whether these employees were entitled to backpay from the date of their discharge or were to be denied backpay until they requested reinstatement.

As you've stated, under Board law existing at the time unlawfully discharged strikers had to request reinstatement in order to trigger an employer's backpay liability, although Chairman Fanning and Member Jenkins had repeatedly dissented from this precedent. As a new Board Member, I evaluated in Abilities and Goodwill the competing arguments that had been advanced over the years on this issue, and found the then-minority position more persuasive for the following reasons:

First, it is important to understand that Abilities and Goodwill does not rest on a mere assertion that, since strikers continue to be employees under the Act, they automatically are entitled to backpay when unlawfully discharged. Nor does

Abilities & Goodwill retreat in any way from the principle that backpay awards generally are inappropriate for periods during which employees voluntarily withhold their labor. Rather, the decision is rooted in the fact that the unlawful discharge of striking employees creates an ambiguous situation concerning whether the employer's unlawful act caused the discriminatees' loss of earnings. Thus, when unlawfully discharged strikers withhold their services after learning of their discharge one cannot be certain whether their continued refusal to work and resultant loss of earnings was caused by the unlawful discharge, in that the discharge made it seem futile to request reinstatement, or was the result of the employees' continued allegiance to the strike. The rule before Abilities & Goodwill resolved this ambiguity against the discriminatees, presuming that their failure to work was voluntary, and requiring them to request to return to overcome that presumption. Abilities & Goodwill, in my view, reaches a result more in harmony with the goals and policies of the Act. It resolves the ambiguity against the wrongdoer, and presumes, absent indications to the contrary, that the employer's wrongful act, not the strike, was the cause of the employees' loss of earnings. To deny backpay in such a situation because of a discriminatee's failure to request reinstatement would run a grave risk of penalizing the employee for his unwillingness to engage in a futile act.

It should not be overlooked that Abilities & Goodwill contains a mechanism to safeguard against those situations where a backpay award would unfairly require the employer to finance a strike. Thus, in no less than 3 places in the decision, the majority emphasizes that an employer may eliminate or reduce its backpay liability at compliance by showing that the discharged strikers would have rejected an offer to return to work or that they otherwise willfully removed themselves from the job market. Such a burden is no different from that traditionally applied in all backpay cases, whether or not the discriminatees were on strike.

This, in my view, represents a sound approach to a particularly troublesome and uncertain area. While the overruling of a 30-year precedent is not something which should be, or was, done lightly, I was obligated to vote in accord with the rationale I found more persuasive. The charge that the decision fails to set forth the cumulative administrative experience necessary to overturn precedent raises a false issue. Of course there is no demonstrable basis for determining instances in which past discharged strikers were prejudiced by the Board's former policy. However, the conflict between the majority and the dissent in Abilities & Goodwill was not based on differing perceptions of the Board's administrative experience, but on an honest, but fundamental, difference regarding the remedial purposes of the Act. The majority view is not a novel one as it represents one side of a controversy well-developed before the commencement of my term. See Chairman Fanning's and/or Member Jenkins' dissenting opinions in, Bartlett-Collins Company, 230 NLRB 148; Michael Muldoon Elder d/b/a Vorpal Galleries, 227 NLRB 446; Valley Oil Co., Inc., 210 NLRB 370. It is often ignored, as well, that Abilities & Goodwill comports with the Board's initial decisions in this area. See, e.g., Gulf Public Service Company, 18 NLRB 586-587, enfd. 116 F.2d 852; Acme Evans Company, 24 NLRB 71; Shellbarger Grain Products Co., 8 NLRB 336.

Finally, I note, too, that in a recent decision the 7th Circuit Court of Appeals examined and enforced the Abilities & Goodwill remedy. See N.L.R.B. v. Mars Sales & Equipment Co., F.2d (1980).

2. There are many complaints from labor law practitioners that the NLRB as presently composed has ushered in a new era of uncertainty as far as the administration of the Act is concerned. Your decisions in cases such as Goodwill indicate that you in particular will not hesitate to overturn carefully reasoned long-standing Board precedents. Now, there must be other well-settled Board rules that you find equally illogical, but have not yet had the opportunity to reverse. In order that persons subject to the NLRA would be in a position to anticipate the changes that will be forthcoming if your reappointment is confirmed by the Senate, perhaps you would be willing to indicate to the Committee where you see additional changes are needed. I realize that you fill what is considered to be an adjudicative position, however, in view of the recent trends in Board decision-making, we already know that what the law is today may not be the law next year.

We are all, of course, intensely interested in the course of labor law under the Act in the coming years. Regrettably, and although I have been dealing with the Act on a daily basis for most of the last 30 years, I do not have the ''crystal ball'' necessary to know which issues will be prominent in the future. As you well know, this Agency's processes are set in motion through charges or petitions filed by various parties; the Board does not act on its own initiative. Consequently, the issues that will arise cannot easily be anticipated, and indeed they all are, in some sense, unique. One would think that after 45 years there would be few questions left unresolved under the Act; yet, it never ceases to amaze me that new issues and varied nuances of old ones are so frequently raised. Thus, in answer to your question, I can only say that if I am privileged to serve a second term, I will continue to examine each issue thoroughly and fairly, ever-mindful that the Act exists primarily to protect the rights of employees. And I will continue to follow established Board precedent in the overwhelming number of cases, as I have in the past three years.

To the extent your question raises concerns about the role of precedent at the NLRB generally, the following comments are in order.

Stare decisis most assuredly plays an important part in Board decisions and in influencing the overall adjudicatory philosophy of this Agency. A decision rarely issues that does not rely on past precedent to support and strengthen a given result. However, stare decisis is not law, but one of many reasons for reaching a given result. The need for predictability must be balanced with the independent judgment and expertise each Board Member brings to the job, and on the infrequent occasions when I have disagreed with precedent, I have, as have dozens of Board members before me, said so. Indeed, as a general matter, I believe the Board is strengthened by its freedom to alter its views based on the expertise and perceptions of different Board Members. Certainly, the fact that precedent is reconsidered and reversed after a change in Board composition is not novel. See, e.g., *Howard University*, 221 NLRB 727 (1975); *Handy Andy, Inc.*, 228 NLRB 447 (1975); *Shopping Kart Food Markets*, 228 NLRB 1311 (1975); *Perma Vinyl*, 164 NLRB 968 (1967); *C.A. Blinne Construction Company*, 135 NLRB 1153 (1962); *Calumet Construction*, 133 NLRB 512 (1961); *Town & Country*, 136 NLRB 1022 (1966); *Bernel Foam*, 146 NLRB 1277 (1964); *Berea Publishing Company*, 140 NLRB 516 (1960); *New York State Electric & Gas Corp.*, 135 NLRB 357 (1962). The remarks of former Board Chairman Frank McCulloch, when questioned about the role of *stare decisis* at the Board during his second confirmation hearing are instructive:

> We have to give an appropriate deference to the decisions of the Boards that went before us. We have to give, especially, deference to the Supreme Court and the court of appeals decisions interpreting the law as written. But we also have an obligation which is imposed by the President's appointment of us to make our best judgment, while giving that deference, as to what the law requires at the time we are there. One of my predecessors, Guy Farmer, the first appointee of President Eisenhower as Chairman of the Board, said on a number of occasions somewhat more crisply what I have said now, that he was not appointed to rubberstamp the decisions of Board members before him, but to give his own best judgment under the powers accorded to him by the President and confirmation of the Senate in interpreting the law as written by Congress. If this

> meant in some cases reviewing and taking a different position from that of his predecessors, then he was going to do it. I think we do this too.
>
> It is a difficult question in every case to know where to draw the line between the weight that you give to prior decisions and the weight that you give to your own conscientious interpretation of the law.

The Supreme Court expressed similar sentiments in N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975), in response to a change in a Board position:

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making.

In sum, for an agency such as the Board, which must retain flexibility to adapt policies to changing times, I believe the chief virtue of stare decisis is not to bind Board Members to decisions of their predecessors, but that it compels the Board to issue clear and well-reasoned decisions adopting a different course. This assures that precedent will not be overturned lightly. Whether one agrees or disagrees with Abilities & Goodwill or General Knit, both are examples of well-reasoned reversals. In this connection, I assume from your comments that you would hope that some future Board would overrule these and other Board decisions which you believe to be unwise, notwithstanding that many are rooted in years of well-established Board and court precedent.

OVER-REGULATION OF CAMPAIGN SPEECH: THE GENERAL KNIT CASE

For many years, labor law scholars and practitioners have criticized the Board for taking an unduly paternalistic attitude toward employees who vote in Board-conducted elections. In particular, they have disputed the Board's premise that voters in its elections are too naive or gullible to evaluate campaign propaganda for themselves, and that the Board must, therefore, intervene and set aside any election where it feels that some misrepresentation of fact by the employer or the union _might_ have influenced the results.

Shortly before your appointment in 1977, a majority of the Board decided in _Shopping Kart Food Markets, Inc._, 228 N.L.R.B. 1311 (1977), that the time had finally come for the Agency to stop wasting its resources and delaying election results by scrutinizing every speech, letter, handbill, poster and flyer exchanged during a union organizing drive to see whether one party or another might have overstretched the truth. _Shopping Kart_ held, in effect, that the voters could be trusted to use their own good sense and recognize propaganda for what it is.

Chairman Fanning and Member Jenkins dissented in _Shopping Kart_, and after your appointment to the Board, you joined with them in _General Knit of California, Inc._, 239 N.L.R.B. No. 101 (1979), to overrule _Shopping Kart_ and revert back to the old, paternalistic approach. This put your Agency back in the business of regulating campaign speech much more strictly than it is regulated in most other types of elections in this country.

Your position in General Knit raises several questions which I believe we need to explore:

1. First, one very troublesome aspect of the General Knit decision, in my view, is that it was the second reversal of policy by the Board on the issue of campaign misrepresentations in less than two years. It is one thing to overrule a precedent which time and study have shown to be unsound. That, I understand, is what the Board majority did in Shopping Kart. They were responding to criticisms by scholars, empirical researchers, and labor law practitioners, including former Chairman Murphy's Task Force of distinguished representatives of both labor and management. But it was quite another thing for the Agency to reverse itself for a second time on such an important matter of policy less than two years later. Don't you feel that this sort of "off-again on-again" regulation weakens public confidence in the Board's competence and expertise?

General Knit is an example of an area where reasonable persons can and do differ. You have pointed out that the Shopping Kart majority believed that Hollywood Ceramics established an unwise policy. However, as the dissents in that case and as briefs from both management and labor in subsequent cases illustrated, that view was far from unanimous in the labor-management community. Indeed, in his initial testimony before this committee, Bob Thompson from the Chamber of Commerce stated, ''I have no basic quarrel with General Knit.'' Further, in testifying in opposition to the Labor Law Reform bill, Mr. Thompson stated:

> It is essential that voters in union elections as well as political elections have the opportunity to become fully informed on the issues in order to make a sound and reasoned decision. In labor-management relations, this requires that both the union and the employer have an adequate opportunity to communicate in a noncoercive fashion with employees regarding the issue of union membership.

As my vote in General Knit indicates, I have no basic quarrel with the sentiments expressed by Mr. Thompson in the testimony I have just quoted. Indeed, I strongly believe that elections should not be decided by misleading bombshells delivered on election eve by a party to the election.[1]

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[1] See my remarks in the Labor Law Journal, Volume 30, No. 2 (February, 1979).

As you are aware, the issues raised by the Board's effort to regulate election conduct have long been fertile ground for scholarly study by the legal academic community. However, it is significant that there has been no consensus in the legal community on the utility of the Board's efforts in this area, or, indeed, on the value of the several academic studies made of that effort.

Thus, the empirical study [2] which was heavily relied on by the Shopping Kart majority was itself subject to scholarly criticism. I note in particulr former Chairman Miller's critique of that study which was published by the Stanford Law Review.[3] Mr. Miller expressed misgivings over the study's assumption that one could determine the effectiveness of a campaign by counting the number of issues voters could recall. Based on his practical experience, Mr. Miller suggested that voters are most likely to recall only the one or two major issues most emphasized by the union and employer. Other critiques in the same law review discuss further drawbacks of the study, including the fact that the first interview with voters occurred shortly before the election, at a time when the early days of the campaign might already have had a substantial impact on the voters' views. While I am encouraged by the fact that scholars are focussing on the evidence in support of and detrimental to the Board's hypotheses, I am less willing than was the Shopping Kart majority to give such studies uncritical acceptance.

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[2] Getman and Goldberg originally published their findings in ''The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation,'' 28 Stanford Law Review 263 (1976). The study was published in book from by the Russell Sage Foundation, entitled Union Representation Elections: Law & Reality.

[3] Edward B. Miller, A. H. Raskin, Patricia Eames, Robert J. Flanagan, ''Four Perspectives on Union Representation Elections: Law and Reality,'' 28 Stanford L. Rev. (1976).

Shopping Kart exemplifies the point I tried to make in my discussion of Abilities and Goodwill, which is that a Board

Member must look at each issue with an open mind and decide for himself (or herself) whether precedent should be adhered to or abandoned. In Abilities and Goodwill, I stated my belief that in the past the Board had failed to accord sufficient weight to the ambiguity created when a striker is discharged unlawfully. Accordingly, I voted to apply a test which recognized the futility of a request for reinstatement when a striker has just been discharged. As with so many other areas of the law, this was an issue that had drawn very strong dissenting opinions throughout the Board's history.

Hollywood Ceramics had a similar history of strongly-held conflicting viewpoints, and the Shopping Kart majority came down on one side of the argument by reversing 15 years' precedent and overruling Hollywood Ceramics. Upon my arrival at the Board, I concluded that the arguments in favor of the prior rule as announced in Hollywood Ceramics were valid. Both Abilities and Goodwill and General Knit are best explained by the remarks of Mr. Justice Jackson in U.S. v. Bryan, 339 U.S. 323, 346 (1950): ''Of course it is embarrassing to confess a blunder; it may prove more embarrassing to adhere to it.'' I believe that Shopping Kart was, if not a blunder, at least ill-advised. While I would have preferred that there be no interuption in the Board's Hollywood Ceramics doctrine, as a Board Member I had to choose either to adhere to a principle that I considered unwise or to return to a long-standing principle which I felt--and feel--protects employee freedom of choice. I chose the latter. I cannot imagine that any Board Member sitting on a five-Member decision would feel bound to adhere to what he or she believed to be an erroneous principle merely because some former Board Member believed that principle was correct. If that were the case, of course, Shopping Kart itself might never have issued. I would think that the labor-management bar's confidences in the Board's expertise would be sorely shaken if attorneys believed that Board Members were ahdering to precedent which they felt was wrong or even destructive of statutory rights merely to avoid overruling past decisions. No Board member of whatever background or persuasion has followed such a course.

2. President Derek Bok of Harvard University put your current policy of election regulation in perspective when he wrote that it creates "a high probability of much unnecessary red tape and needless expense, running into the millions of dollars, for taxpayers unions, and employers." J. Getman, S. Goldberg & J. Herman, Union Representation Elections: Law and Reality (1976), forward by Derek C. Bok at p. xii. He also wrote that "the existing rules give rise to delays, distortions, and game playing that create risks of injustice at least as great as those which might occur if the current rules were relaxed." Id. at p. xiii. I take it you would disagree with Mr. Bok's views, but I would like to know what consideration, if any, you and your colleagues in the majority in General Knit gave to relative expense to "taxpayers, unions and employers" resulting from your policy, and what specific benefits you found to justify that expense.

If expense to employers, unions, and taxpayers were the only variable to be considered in making Board decisions, and if one could clearly establish that coming down on one side as opposed to the other would incur greater expense for all parties, the life of a Board Member would be far easier. However, an additional factor that was weighed in General Knit was the protection of employee free choice, and in that case the economic consequences of the choices before the Board were far from clear.

Professor Bok points to some costs incurred in protecting employee free choice, and those are real costs. On the other side of the equation, however, are equally real costs of denying employee free choice. What is the economic value of a fair and free election? What is the cost to the taxpayer when the parties who come before us in a representation proceeding have no confidence in the integrity of our elections? What is the cost to an employer who is ordered to bargain with a union that has obtained bargaining rights through misrepresentaions (and, you will note, General Knit itself involved alleged union misrepresentations)? What is the cost to a union that must engage in repeated organizational campaigns because employer misrepresentations have made a mockery of past elections? What is the cost to taxpayers of repeated representation proceedings, or of processing technical refusals to bargain whereby an employer seeks court review of a Board certification?

These questions and the like show the difficulty faced by the Board when it tries to do a cost-benefit analysis of its policies. I believe that if one could apply such an analysis accurately, Shopping Kart and General Knit would come out roughly even. The difference is that General Knit has the additional benefit of protecting employee free choice.

3. The majority opinion in General Knit, to which you subscribed, states that consideration of the effect a particular rule or policy would have on the Board's caseload "has no place in the administration of the Act." It goes on to state:

> If the Board is overburdened, the solution is more efficient procedures and/or increased staff, not a voluntary abnegation of our statutory responsibility, 239 N.L.R.B. No. 101 at p. 7, n. 13.

To me, this statement stands out as a remarkable expression of bureaucratic thinking. It reflects no sense of obligation to establish priorities or to shape policies with an awareness of the practical limitations on the government's resources. I realize you subscribed to the statement, but do you really believe that the effect of your policies on the Agency's caseload should be given no consideration whatever?

I previously have indicated that the Board operates under a Congressional mandate to protect certain public interests. In 1959, Congress enacted Section 14(c) to remind the Board that budgetary pressures were not a sufficient reason to deny the protections of the Act to particular groups of employees. Further, the General Knit opinion set out fully the reasons for our conclusion that employee free choice would be seriously impaired if the Board were to abdicate its function of overseeing the fairness of our elections. A fair reading of the General Knit decision makes it evident that the Board recognized that caseload considerations could not justify the denial of employees' statutory rights. The decision recognizes that the Board's inquiry should be a narrow one, limited to those practices that impair employee free choice. Thus, the Board's practice, as set forth in General Knit, is to intervene only where ''a substantial and material misrepresentation of fact had a reasonably tendency to affect the results of the election,'' and further only where the other party had no time for an effective reply. The Board has given due consideration to its caseload, consistent with conscientious attention to our statutory purpose.

4. Member Penello pointed out in his dissenting opinion in General Knit that in cases involving election misrepresentations, the Board's success rate in the courts of appeals is only about 50 percent. He contrasted that with an 85 percent overall success rate in the courts. Now, I understand that since your appointment, the Board's overall rate of success in the courts has actually slipped to about 64 percent, rather than 85. But even that is still a good deal better than the 50 percent rate in cases involving election misrepresentations. How do you accout for the great difficulty the courts have had in accepting the Board's rulings in this area?

Your question raises an interesting area of labor law, which is the extent to which adverse court decisions should prompt an immediate change in Board policy. Although their conclusions differ from mine, this subject was addressed by former General Counsel John Irving, along with Carl L. Taylor, former Associate General Counsel for Enforcement Litigation, in an article entitled ''The Limits of Judicial Deference to NLRB Expertise.'' The opening paragraph of that article explains the uneasy relationship between the Board and the courts:

> The statutory relationship between the Board and the appellate courts reviewing its decision has always been subject to a certain amount of tension because of differences between the Board and the courts over the proper scope of judical review in particular cases. Contributing to this tension is the fact that any single court of appeals can enforce its disagreement with the Board only within the geographical limits of its judicial circuit. The Board is free to try again in other circuits. The Board is also free to ask the Supreme Court to review the appellate courts, and the Board has had good success in persuading the Supreme Court to reverse appellate courts that have reversed the Board.

This paragraph is a good starting point for a consideration of the Board's enforcement efforts. The holding of a three-judge panel on a legal issue is not binding in other circuits. Indeed, depending on the rules of the particular circuit, such a holding may not be binding on other panels of the same circuit. Thus the Board may return to the same circuit in another case and seek a different result by urging that the earlier case was wrongly decided. Of course, in any circuit the Board may argue that a particular case is distinguishable from prior adverse court decisions.

The circuits are not always pleased when the Board exercises its option to disagree with a panel finding. For example, the Fourth Circuit initiated a series of decisions concerning what was or was not a mandatory subject of bargaining that were adverse to the Board's position. The first case was N.L.R.B. v. Westinghouse Corp., 387 F.2d 542 (1967), in which the Fourth Circuit held, contrary to the Board, that food vendor prices did not constitute a mandatory subject of bargaining. The First Circuit joined the Fourth Circuit's position in 1972 in Package Machinery Company v. N.L.R.B., 457 F.2d 936 (1972). The Seventh Circuit initially joined th First and Fourth Circuits, in N.L.R.B. v. Ladish, 538 F.2d 1267 (1976), but another panel in the same circuit upheld the Board's position in N.L.R.B. v. Ford Motor Co., 571 F.2d 937 (1978). Ultimately, the Supreme Court resolved the controversy in the Board's favor in Ford Motor Co., 441 U.S. 488 (1979).

A similar history of circuit court conflict lead to the Supreme Court holdings in the Board's favor in Bayside Enterprises Inc. v. N.L.R.B., 429 U.S. 298 (1977), concerning the scope of the agricultural exemption, and N.L.R.B. v. Walton Manufacturing, 369 U.S. 404 (1962), concerning the test for substantiality of evidence in reinstatement cases.

This process of awaiting an appropriate case in which to seek certiorari is often time-consuming; in the case of the Walton decision, more than two decades elapsed between the first adverse circuit court decision and the Supreme Court's favorable ruling. In the meantime, where the position of the court of appeals seems clear and no appropriate basis for distinguishing the case appears, the Board sometimes consents to the entry of an adverse court judgment. The Board finds this preferable to any attempt to vary its conclusions on the basis of where a particular case arose. Such an attempt at variable justice depending on the circuit would be improper, and in any event, would not necessarily achieve its purpose, for the Board cannot predict which circuit will review its orders. A Board decision may be reviewed in the circuit where the case arose or wherever the person filing for review ''resides or transacts business, or in the United States Court of Appeals for the District of Columbia Circuit.'' This may mean that an unhappy respondent bent on ''forum shopping'' will attempt to find some nexus with a circuit that has disagreed with the Board and file its petition there rather than in the circuit where the unfair labor practice arose. In these circumstances, the Board has found that its best course of action is to follow a national labor policy and endure reversals at the circuit court level in the meanwhile.

The courts themselves recognize the necessity for the Board to adhere to its position on a national basis, even when it conflicts with the decision in the circuit where a subsequent case arises. One area that is instructive to examine is the Gale Products line of cases.

In Gale Products Divisions of Outboard Marine Corp., 142 NLRB 1246 (1963), the Board held that a union could not waive the statutory right of employees to engage in protected distribution of materials relating to matters of common concern. The Board's order was denied enforcement by the Seventh Circuit, 337 F.2d 390 (1964). The Sixth Circuit also rejected the Board's position in two cases--Armco Steel Corp. v. N.L.R.B., 334 F.2d 621 (6th Cir. 1965), and General Motors Corp. v. N.L.R.B., 345 F.2d 516 (6th Cir. 1965). Later, another similar charge was filed against Armco Steel, the successful litigant in the earlier Sixth Circuit case, and the employer filed suit in district court seeking to enjoin the Board proceeding. In Armco Steel Corp. v. Ordman, 414 F.2d 259 (6th Cir. 1969), the Sixth Circuit affirmed the district court's dismissal of the employer's action. In so doing, the court observed that the Fifth Circuit had taken a position contrary to that of the Sixth Circuit on this issue, and that the Board had assured the court that any application for enforcement in the newest Armco case would be filed in the Sixth Circuit. Ultimately, the Supreme Court upheld the Board's position on the subject, in its decision in Magnavox, 415 U.S. 322 (1974), reversing another Sixth Circuit decision. Although it took ten years for the Board to prevail on this issue, the Sixth Circuit refrained from criticizing the Board for pursuing a national labor policy in the four cases which came before that Circuit.

Of course, at times the circuit courts convince the Board that its earlier decisions were wrong. The Board's opinion in Painters Local No. 452, 238 NLRB No. 148 (1979), in which the Board acceded to court interpretations of Section 8(g), is a recent example of the persuasive power of circuit court decisions running contrary to the Board's interpretation of the Act. A very early example of this same phenomenon is Armored Motor Service

Company, Inc., 106 NLRB 1139 (1953), in which the Board found persuasive circuit court decisions holding that armored car guards were ''guards'' within the meaning of the Act. Numerous other examples could be cited.

On other occasions, the Board may adhere to its position but find it necessary to clarify its reasoning for the benefit of reviewing courts. This approach is particularly helpful where the Board perceives that the courts have misconstrued the Board's position on an issue.

The result of the options I have outlined above is that a circuit which disagrees with the Board on a particular principle may issue a series of unfavorable decisions involving plants from all over the country. If the principle is a frequently-encountered one, this may result in a more-or-less temporary decline in the Board's enforcement rate in that circuit. For example, in fiscal year 1979, the Board's record of cases enforced in full ranged from 84 percent in the Third Circuit down to less than 45 percent in the Second Circuit. Nationwide, 64.6 percent of the Board's orders were enforced in full, and an additional 12.7 percent were affirmed with modifications or affirmed in part . Some of this variability may result from strings of related cases. Some may result from differences in philosophy among the circuits concerning the advisability of giving the Board's decisions on close legal issues the benefit of the doubt.

With regard to the Hollywood Ceramics line of cases, the interesting thing about the Board's enforcement rate is that circuit courts in certain circumstances have applied the *Hollywood Ceramics* principle more strictly than has the Board. The *General Knit* decision gives illustrative examples of this at footnote 14. All the same, the misrepresentation area results in very few Board and court decisions. In Fiscal Year 1976 for example, the year preceding the Board's *Shopping Kart* decision, only 307 cases involved *Hollywood Ceramics* allegations; this, of course, represents only a small portion of the 8,899 elections conducted by the Board in that year. Similarly, in Fiscal Year 1979, less than 4 percent of the 8,249 representation elections conducted by the Board resulted in objections alleging misrepresentations. As the *General Knit* majority opinion stated, it is our belief that one reason we see so few *Hollywood Ceramics* allegations is the deterrent effect of the Board's policy concerning misrepresentations.

As I mentioned, the *Hollywood Ceramics* area results in very few court appeals as well. The highest number of court appeals on *Hollywood Ceramics* issues occurred in 1968 and 1975, when 11 appeals were filed in each year. I can only speculate on the motives of parties in contesting or accepting Board determinations in this area. Yet, this low rate of appeal indicated to me that our standards have been well accepted by the parties, and consequently that only the closest cases are appealed. If this thesis is true, then the Board's relatively low rate of enforecement could mean no more than that the parties choose better appeal vehicles, on the average, in the *Hollywood Ceramics* area. Finally I would observe that is is too early to tell whether the Board's re-articulations of its *Hollywood Ceramics* standard has resulted in any change in our enforcement rate in this area.

5. It is my understanding that prior to the Taft-Hartley Amendments in 1947, the Board interpreted the Act as requiring employers to maintain strict neutrality with respect to unionization of their employees. This meant that employers could not campaign against unionization as they do today. At the same time, prior to 1947, the Board also followed a "hands off" policy with regard to campaign statements by unions. It would not set aside an election simply because a union had misrepresented the facts to the voters. Then, in 1947, Congress added Section 8(c) to the Act, which was supposed to guarantee employers the same right of free speech as unions had enjoyed. I find it somewhat ironic that only then did the Board begin to crack down on campaign statements by either party which might pollute the so-called "laboratory atmosphere" of a Board election. I know you were not a Board member at that time, but do you believe it is significant that the Board did not treat misrepresentations as a serious problem as long as only unions had the right to make them? Do you feel that the average voter in Board elections today is any less able to evaluate election propaganda than were voters prior to 1947?

Your understanding of Board policy with respect to election objections prior to the Taft-Hartley Amendments in 1947 is only partially correct. It is true, as you point out, that during the early years of the Wagner Act the Board required employers to remain neutral with respect to the question of union representation. However, pursuant to the Supreme Court's decision in NLRB v. Virginia Electric Power Company, 314 U.S. 469 (1941), the Board abandoned its neutrality doctrine and thereafter both employers and unions were free to engage in partisan campaigning. It is inaccurate to say, however, that the Board ''. . . would not set aside an election simply because a union had misrepresented the facts to the voters.'' In fact, the Board, for policy reasons, chose not to consider misrepresentations as grounds for invalidating an election. But this was true regardless of whether the alleged misrepresentation was attributed to a union or an employer. As you also point out, the Board made no attempt to regulate campaign misrepresentations until after the Board announced its intention to see that, insofar as possible, Board elections be conducted in an atmosphere of so-called ''laboratory conditions.'' See General Shoe Corporation, 77 NLRB 124 (1948). Thereafter, the Board's prior policy of noninvolvement was gradually subordinated to one which stressed employees' ability to evaluate the propaganda they were subjected to during the course of a preelection campaign.

I think it important to point out that all times, both before and after the adoption of the ''laboratory conditions'' standard, the Board's policy was applied in an even-handed manner toward both employers and unions. Thus, during the Wagner Act, alleged misrepresentations of fact were not a ground for overturning an election and this was true whether the misrepresentation was engaged in by an employer or a union. After General Shoe, misrepresentation of a material fact might serve to overturn the election results. Again, however, this was true for misrepresentations engaged in by unions as well as employers.

I do not believe ''that the average voter in Board elections today is any less able to evaluate election propaganda than were voters prior to 1947.'' I also do not think voters at any time have had a significant capability to evaluate misrepresentations of fact where the party with particular knowlege of the facts is the party making the misrepresentations. I cannot, of course, tell you whether I would have felt the same way had I been a Member of the Board in 1947. All I can say on this point is that I have always believed that, to the extent possible, Board elections should be conducted in an atmosphere free of deceptive tactics by either employers or unions, and it was for this reason that I voted to return to the Hollywood Ceramics standards in General Knit.

QUESTIONABLE DECISIONS

Some of the decisions in which you have participated leave me wondering what you and your colleagues had in mind, because, to be frank, they seem so far removed from common sense.

For example, in one case involving a Chinese restaurant in San Francisco (M Restaurants, Inc., 238 NLRB No. 212), you joined with Chairman Fanning in awarding backpay to an illegally discharged employee for a period of 13 months when he was not available for reinstatement or looking for other work in San Francisco, but in fact had returned home to live with his parents in Taiwan. His earnings in Taiwan, of course, were much lower than what he would have earned at the restaurant in San Francisco, but his living expenses were much lower too. Yet, in your backpay award you took no account of the difference in the two countries' economies. You set off his Taiwanese earnings, which amounted to only a few hundred U.S. dollars in 13 months, against his San Francisco wage losses, and ordered the employer to pay him the difference in full U.S. dollars.

1. I would like to know how you can reconcile this decision with the long line of cases holding that a discriminatee who voluntarily takes himself out of the job market and is not available to work for the employer is not entitled to backpay for that period?

The decision in M Restaurants, Incorporated, d/b/a The Mandarin, 238 NLRB No. 212 (1978), was not a departure from the Board's principle that a discriminatee who voluntarily removes himself from the job market is not entitled to backpay for that period. While there may be reasoned disagreement over what constitutes a voluntary removal from the job market, I believe The Mandarin decision was in accord with Board precedent. That case was decided by the administrative law judge, affirmed by a Board panel majority, of which I was a part, and enforced by the Ninth Circuit Court of Appeals because, on the particular facts of that case, the Board and the Court determined that the discriminating employer failed to sustain the burden of showing that the discriminatee, a legal alien, did not exercise diligence in limiting the backpay liability. As the Court stated in enforcing the Board's Order: ''A discharged employee is not confined to the geographical area of former employment; he or she remains in the labor market by seeking work in any area with comparable employment opportunities. Substantial evidence supports the Board's finding that [the discriminatee] acted reasonably in moving temporarily to Taiwan and accepting employment there.'' 104 LRRM 2818, 2819 (citations omitted).

2. Do you feel that discharged employees ought to be required to make continuing efforts to mitigate their wage losses?

Yes. The Board's Casehandling Manual for Compliance specifically sets forth the reasonable efforts a discriminatee must make to obtain other work in order to mitigate losses. See generally Sec. 10616. As the administrative law judge explained, and as the Court agreed, the discriminatee in The Mandarin case made reasonable efforts to secure another job over a long period of time. I believe that is the proper Board principle to apply.

3. If a dischargee cannot find another job right away, should he be allowed to take, in effect, a paid vacation to another land where he can live more cheaply while the backpay clock keeps running in full U.S. dollars?

It must be noted that the Mandarin case does not condone laxness or ''vacations'' by discharged employees in seeking alternative employment. Indeed, one can imagine that if the employer discovered that the discriminatee in this case had refused the offer to go to Taiwan, it might well have argued that the discriminatee failed to avail himself of all opportunities to mitigate losses. Moreover, the record in this case is instructive on this question. Meng, the discriminatee, was unable to find a job in the geographical area of his former employment for 18 months after his discharge. He received approximately $34 from weekly unemployment compensation until his brother-in-law offered him a job in Taiwan with the opportunity to earn $75 plus a commission. Meng availed himself of this opportunity, thereby mitigating his losses. Moreover, it does not appear from the record in this case that the employer contested the use of U.S. dollars as the proper measure of backpay.

Another case that left me wondering was United Paperworkers, Local 12 (Duro Paper Bag Mfg. Co.), 236 NLRB 1525 (1978), in which you joined with Chairman Fanning and Member Jenkins in holding that a union with a dispute against a paper bag manufacturer could lawfully picket at a Kroger super market asking Kroger's customers not to use paper bags to carry their groceries. The complaint charged that the picketing amounted to a secondary boycott, because by asking shoppers not to bring groceries out of the store in bags, the Union was in effect asking them not to patronize the store. Kroger's was completely neutral to the labor dispute. The record showed that cardboard cartons were unavailable at the store at least part of the time, but you and your colleagues reasoned that, nevertheless, shoppers did not need paper bags to continue normal patronage at Kroger's.

1. Perhaps this question would be better put to Mrs. Truesdale, but do you visit the super market very often?

2. How many groceries can you carry without a box or a bag to put them in?

3. Don't you think it is a fair assumption that many shoppers, if told they must either go back home and get their own bags or carry their groceries out without a container, would simply take their business to another supermarket?

As the Senator undoubtedly knows, issues arising under the secondary boycott provisions are among the most difficult coming before the Board. The issue presented in *United Paperworkers Local 832 (Duro Paper Bag Mfg. Co.)* is no exception. Because the statute is less than clear concerning congressional intent, the Supreme Court has, in a number of decisions, delineated the contours and parameters of the secondary boycott provisions, providing guidance to the Board in deciding issues under those provisions. While the Senator may disagree with the specific holding in *Duro*, the decision reached has a legally sound basis as demonstrated by a careful review of that decision in light of the Supreme Court's decision in *NLRB* v. *Fruit & Vegetable Packers Local 760 (Tree Fruits Labor Relations Committee)*, 377 U.S. 58 (1964).

In *Tree Fruits*, the Court stated in a similar context, that consumer picketing will be held to violate Section 8(b)(4)(ii)(B) *only* if it appeals to consumers to boycott generally the user or distributor of the struck product. Thus the Court concluded that a consumer appeal limited to the struck product was perforce a primary appeal and therefore its lawfulness was unaffected by a consequent reduction in the business of the neutral employer in the struck product. The Court viewed any broader limitation on consumer picketing as running afoul of the 1st amendment and Section 13 of the NLRA (right to strike section).

A review of the facts in *Duro* would be helpful at this point. In *Duro*, the union had picketed and handbilled two supermarkets operated by the Kroger Company because they utilized paper bags manufactured by Duro, the company with which the union had its labor dispute. The picketing signs and handbills clearly identified the product being struck and briefly stated the reason for the consumer handbilling and picketing. The signs and handbills informed the consuming public to bring their own bags to package items in the store or to ask the store for a box. In fact consumers desiring not to use Duro paper bags were given, upon request, cardboard boxes in which to carry their groceries. To a limited degree, Kroger was unable to fulfill all the requests for boxes. However, some customers provided their own containers to carry grocery items.

The issue presented was whether consumer picketing limited to an appeal to Kroger's customers not to use paper bags manufactured by Duro violated Section 8(b)(4)(ii)(B) of the Act. The Board, following the test laid down by the Supreme Court in Tree Fruits, held that no secondary boycott violation was made out because the consumer picketing was carefully circumscribed in objective, text, timing and location so as to appeal narrowly to Kroger's customers not to use Duro paper bags, rather than not to patronize the Kroger stores at all. Thus the decision was on all fours with that in Tree Fruits. Further the Board noted that this was not a situation where the struck product had become an integral part of the retailer's entire offering such that any product boycott would of necessity encompass the entire business of the neutral employer. This point was aptly illustrated by a comparison with the facts in Teamsters Local 327 (American Bread Company), 170 NLRB 91 (1968), wherein the union picketed secondary restaurants using bread supplied by the primary employer. The Board stated that a customer in these restaurants was ''hardly in a position to choose the brand of bread he will consume, as a customer in a retail store is able to do,'' that the bread had become merged in the restaurant's overall product, and therefore that the union had violated Section 8(b)(4). The distinction can be further illustrated by the Board's decision in Cement Masons Local 337 (California Ass'n of Employers), 192 NLRB 377 (1977), in which the union engaged in consumer picketing of a residential housing development to publicize a dispute over wages paid to nonunion cement masons employed by the general contractor. The picketing was determined to be an attempt to boycott totally the developer's business since the masonry work had become an integral part of the new homes offered for sale.

These cases indicate, consistent with relevant decisions of the Supreme Court, that in order for consumer picketing to lose its protection under the Act, the product boycotted must lack any significant, separate identity apart from the employer's overall business such that a boycott of that product would invariably diminish, in a significant way, the rest of the employer's business. Since the paper bag service provided by Duro constituted a discrete, readily identifiable service which could be separated from Kroger's overall grocery operation without *ipso facto* impacting on Kroger's overall provision of grocery items, there was no basis for concluding that the union violated Section 8(b)(4)(ii)(B). Significant in this regard was the fact that alternate means for carrying goods from the stores were generally available and that many customers took advantage of these alternatives. It should also be recognized that any immediate shortage of carrying receptacles would be dramatically eased as the strike progressed because of the public's awareness that they should bring their own bags and because Kroger would be on notice that more boxes would be needed. Further, and perhaps most telling, is the fact that during the course of the strike only one incident was reported of an individual not patronizing the store because of the unavailabiliy of a box.

The foregoing, in my opinion, amply justified finding that no violation of the Act had occurred because of the union's consumer picketing.

The specific answers to your questions are that I visit the supermarket frequently and could not carry many groceries without a box or bag (and so would take one there if need be---we save them at home for many purposes). The answer to your third question is apparent from the fact that only one customer appears not to have patronized the store because of the unavailability of a box. Finally, I think it worth pointing out that many grocery chains, particularly the newer discount grocery stores, do not provide bags but instead require customers to bring their own containers for carrying groceries.

Irresponsible Holding Re: Doctors' Picketline Conduct

In Montefiore Hospital, 243 NLRB No. 106, you and members Jenkins and Murphy held that the Employer, which operated an outpatient clinic serving the low-income population within walking distance of the clinic, violated the Act by discharging two doctors who joined a strike, identified themselves as doctors to approaching patients, told them about the strike, and told them they would "receive better medical care" elsewhere, (i.e., at a non-struck facility).

1. Isn't it unrealistic to suggest, as you do in the opinion, that a decision by a low-income patient, upon recommendation of a doctor, to "forego treatment at that clinic" was a "voluntary choice"?

2. Should a doctor whose advice in this regard is heeded be held liable for a patient's aggravated harm or injury, traceable to the delay in receiving medical treatment, especially if the doctor, before recommending that the patient "forego treatment" at the clinic, makes no effort to ascertain the patient's condition and/or makes no suggestion regarding other, equally accessible, equally low-cost medical care?

3. Why should an employer have to continue to employ a doctor who shows such a disregard for the patients health and disparages the employer in such a manner?

The Montefiore case presented an issue of some importance to labor relations in the health care industry since it involved the question of whether doctors, who legitimately assume the status of strikers, should be treated differently from nonphysician strikers in the health care industry. Since the Statute does not expressly or implicitly indicate that such a distinction could be drawn, i.e., that a physician striker could be treated differently from a nonphysician striker, I, along with Members Murphy and Jenkins, concluded that the Respondent-Hospital unlawfully discharged two doctors who did no more than communicate to prospective patients, in an informational and accurate manner, the strike's impact on the provision of care and services by the Hospital's clinic.

Before responding to your questions, a review of the facts in the case would be helpful to a complete understanding of the issues presented. In Montefiore, employees represented by District 1199 of the National Health and Hospital Employees Union engaged in a lawful economic strike of the Hospital. During the course of that strike, Doctors Gold and Fisher, not members of the union, joined in the strike and thereafter ceased performing any services for the Hospital. While picketing the Hospital's premises, Gold and Fisher approached prospective patients and, after identifying themselves as clinic physicians, informed the patients that there was a current strike involving most of the clinic workers, that the clinic was accordingly not then a full-service facility, and that better medical care could be obtained at a full-service, nonstruck facility. At the end of the strike, Gold and Fisher were discharged on the grounds that they had engaged in the following objectionable conduct: each had abandoned his or her duties without notice to the Hospital; had refused to carry out assigned tasks; had interfered with the operation of the clinic by obstructing patients seeking medical care; and had disparaged the medical services available at the clinic. Subsequently, the doctors were reinstated.

In response to your first question, it is important to bear in mind that whether the decision of a prospective patient to ''forego'' treatment at the clinic was ''voluntary'' or not is not the central issue in this case and arguably was not an issue at all. The main issue was whether it was permissible for the Hospital to treat physician strikers differently from nonphysician strikers simply because they accurately informed patients that normal medical services had been sharply curtailed at the clinic as a result of the strike and that full medical services might have to be obtained elsewhere. On that narrow issue, Members Murphy, Jenkins and I concluded that the statute provided no basis for treating similarly situated strikers differently simply because of their status as professionals. In this regard, other than characterizing employees as unfair labor practice strikers or economic strikers, no distinction is normally drawn between types or classifications of strikers for purposes of determining whether certain picket line conduct enjoys the protection of the Act. Further, and most importantly, the doctors here had the undoubted right to engage in a sympathy strike in support of fellow employees at the clinic. And a limitation on that right is not lightly to be found since, under Section 13, the Statute specifically directs the Board not to find any limitation on the right to strike except as expressly provided in the Statute. If a distinction were drawn, as essentially urged by the Hospital, between physicians and nonphysicians strikers for the purposes of determining permissible picket line conduct, a higher standard of conduct would have been imposed on physician strikers such that it would have operated to effectively abridge their right to strike. Such a result obviously would have contravened Section 13.

By focusing on whether the patient's decision to go elsewhere was ''voluntarily'' entered into, your question ignores the fact that the intended and likely effect of any picketing is to dissuade third parties from dealing with the primary employer. Absent violent or outrageous conduct, or conduct demonstrating a serious disregard for the truth or falsity of disseminated information during the strike, an employee is not deprived of the protection of the Act when he makes a statement regarding the strike's impact on the struck employer. And in this regard an employer's judgment as to what is indefensible is not determinative. It is interesting to note at this juncture that there seems to have been no dispute concerning the general accuracy of the doctors' remarks regarding the curtailment of services at the clinic. Nor is there any doubt that such remarks, if uttered by non-physician strikers, would have been protected.

In conjunction with the foregoing, and in partial response to question 3, the Board and the courts, consistent with the view that the exercise of statutory rights would be impaired if employees were not granted a certain amount of leeway in their speech and conduct during the course of protected activity, have evolved the general standard that employees engaged in otherwise protected activity do not forfeit the Act's protection unless their conduct is so violent or of such a nature as to render the employee unfit for further service. Of course, the remarks of the doctors in the instant case cannot in any way, shape or form be construed as violating that standard. The doctors here did no more than characterise current conditions at the clinic as a result of the strike, and their suggestions that patients seek medical care at another, more fully staffed, facility flowed naturally from their observations. Thus the doctors directly connected the quality of service problem at the clinic to the temporary strike situation and did not, as far as the stipulation disclosed, indicate that the current service impairment was normal or endemic to the clinic. Their remarks therefore were carefully tailored to the situation at hand and were not offered to denigrate or ridicule the provision of medical services at the clinic. Consequently, there is no basis for interpreting or construing those remarks as ''disparaging.'' Indeed, it would seem unlikely that doctors would deride the health care facility where they expect to continue to provide their services at some future time.

Furthermore, the strike and picketing activity of Gold and Fisher was far removed from advising patients as to their medical needs. Although at times identifying themselves as doctors, the two were essentially demonstrating their support for the strike and appealing for similar support from the public. Gold and Fisher did nothing to indicate they had disassociated themselves from the Union's strike effort and had assumed the distinct doctor-advisor role on the picket line. They did not examine any patients, venture opinions as to their condition, or otherwise undertake to give treatment. The administrative law judge's finding in this case that the failure to examine patient's served to remove the protection of the Act from the doctors assumed that the doctor's were acting in a medical capacity. The facts, however, show that Gold and Fisher were acting as sympathy strikers and their failure to undertake examinations and treatment simply serves to confirm this strike-related role. In this context, their statement concerning ''care'' was not a directive on what was ''medically inadvisable'', but merely a question as to whether the strike-depleted staff of 4 could offer the services normally provided by the regular 39 employees. Moreover, strikers other than doctors might reasonably make the same observation and not be said to offer ''medical advice.''

This question is really better addressed to another forum since it primarily concerns questions of potential tort liability flowing from a physician's picket line conduct.

Your question in part suggests that, by striking, doctors in essence consciously disregard the health interests of their patients. Of course, under that theory, any doctor who withholds services during a strike can be accused of ''disregarding'' the health interests of his patients. Such a theory, however, paints with too broad a brush and lacks a basis in reality. Furthermore, carried to its logical conclusion your question suggests that an employer could treat any doctor who has joined a strike as having shown ''disregard for the patients health,'' and deny the doctors' reinstatement for that reason alone. Such a result, I think you must agree, would fly in the face of the congressional intent manifested in adopting the health care amendments to the statute. In this regard, it does not seem terribly sound to construe the doctor's remarks here, concerning care available at the clinic, as a disregard of the health needs of their patients. Underscoring the above is the fact that the clinic handled almost exclusive nonemergency cases. Therefore, any patient who decided not to patronize the clinic could get timely treatment at another facility. In Montefiore, we made it clear that we were leaving open the question of whether a doctor's conduct, similar to that disclosed herein, could continue to enjoy the protection of the Act in an emergency situation.

Recently, the Second Circuit denied enforcement of the Board's finding in this case that the striking doctors' statements regarding care at the struck facility was protected, but enforced the other findings of the Board. The court felt that the doctors had overstepped the bounds of permissible strike

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conduct. Obviously, on such an issue, reasonable men may differ. However, Congress has given to the Board the responsibility for striking the balance between statutory protection and competing employer interests. American Telephone & Telegraph Co. v. N.L.R.B., 521 F.2d 1159, 1161 (2d Cir. 1975). With all due respect to the view of the second circuit the balance was struck here in favor of finding the doctors' conduct protected because it fell well within the boundaries of conduct found protected in other Board and court decisions. As noted, the protection of the Act is not lightly withdrawn from activity otherwise falling within the purview of Section 7. Thus, wide latitude is accorded statements made in the course of protected activity in recognition of the fact that passions run high in labor disputes and that accusations are commonlace. However, as also noted, the statements of the two doctors were linked to the strike and did no more than reflect their honest opinion of the impact of the strike. Their statements therefore were part of the overall strike appeal for public support. Further, they were the kind of statements that other strikers could have made. As such, they did not appreciably expand upon the picketing's protected appeal. In short, a reasoned judgment was made by the Board that no justification existed for denying doctors the same breath of Section 7 strike appeals as enjoyed by other employees.

THE BOARD'S DISREGARD FOR CONGRESSIONAL POLICY CONTAINED IN OTHER STATUTES

Neither the NLRB nor any other agency has the authority to apply its jurisdiction or interpret its organic statute in a manner that interferes with the policies established in other statutes. The Supreme Court instructed in Southern Steamship Co. v. NLRB, 316 U.S. 31, 47 (1942), that:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other than equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

At the same time as the Board is having its expertise in administering the NLRA increasingly questioned by the appellate courts, the Board has also tried to regulate several subject areas where it clearly has no special expertise. In fact, Mr. Truesdale, there are a number of decisions in which you have joined where the Board seems to have gone on a rampage through other statutory schemes with little concern or regard for the consequences.

Illegal Aliens

Sure-Tan, Inc. and Surak Leather Co., 246 NLRB No. 134 (1979) (Majority: Fanning, Jenkins, Truesdale; dissenting: Murphy and Penello), an order denying the General Counsel's motion to clarify the Board's order in 234 NLRB 1186 (1978).

In its initial order the Board (Fanning, Jenkins and Penello) found that the employer violated Section 8(a)(3) when it discharged five of its Mexican employees who supported the union. It found that the employer, with full knowledge that the employees had no papers or work permits, requested the Immigration and Naturalization Service to investigate their status. The investigation resulted in immediate deportation proceedings. The ALJ had recommended that a reinstatement order should be effective for only six months because he felt it was unlikely that the discriminatees would be able to return legally to the U.S. He also declined to order any backpay because the aliens were in Mexico and were physically unavailable for work. The Board however found that the reason for the recommended remedies was unnecessarily speculative and ordered that such issues be deferred to a compliance proceeding.

The General Counsel then filed a Motion for Clarification contending that the Board's Order did not distinguish between legal and illegal immigrant status and was contrary to the national immigration law and policy. He argued that the Board's order encouraged deported discriminatees to return illegally as quickly as possible to claim their jobs and backpay rather than wait until an uncertain date when they might be able to reenter the U.S. legally. The General Counsel suggested that reinstatement should be ordered only for those discriminatees who are able to reenter the U.S. lawfully; and that backpay should accrue only from the time a lawfully returned discriminatee is denied employment after his return.

The Board majority (Truesdale, Fanning and Jenkins) denied the motion for clarification and ruled that the employees are to be offered "unconditional reinstatement." The usual backpay period was applied (i.e., from the loss of employment to the date of a bona fide reinstatement offer). Those discriminatees who are located but found to be unavailable for work (including enforced absence from this country) would have their back pay tolled. But the majority stated: "We do not regard it as within our authority to alter the obligations imposed by the [NLRA] in a manner which might assist in reaching whatever may be the current goal of immigration policies, and would be uncertain how to do so even if we consider it proper." (246 NLRB No. 124, slip. op. at 3).[1]

Member Penello dissented and would have required the employer to offer reinstatement only to those discriminatees lawfully in the U.S. He felt the Board's order would encourage the aliens to reenter the U.S. illegally. Member Murphy agreed that the Board's order was contrary to federal immigration laws. Also, she would have limited back pay to the time from the date of discharge to the date of deportation, and would have required that the offer of reinstatement be made, but that acceptance be made within a reasonable period, such as 2 weeks.

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[1] This case involves the question of back pay and reinstatement to illegal aliens who have been deported. Deportation had not occurred in two cases where Board orders were enforced. NLRB v. Sure-Tan, Inc. and Surak Leather Company, 583 F.2d 355 (7th Cir.) upheld the eligibility of illegal alien residents to vote in a certification election. The court noted that back pay and reinstatement issues were not before it. (583 F.2d at 358 n.4). The dissenting judge in Sure-Tan felt the Board's position was contrary to the federal Immigration laws. In NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979), illegal aliens were found to be "employees" under the NLRA, and reinstatement was seen as a proper order. The illegal aliens had not been deported.

Questions

1. Congress hasn't given the NLRB any mandate to interfere with the federal immigration laws, and it has no expertise in this area. Yet, the Board has made a ruling which the dissenting members feel would encourage illegal aliens to reenter the United States without proper authorization.

a. There is nothing in the Board's opinion indicating that the Immigration and Naturalization Service was consulted before this decision was made.

1. Did you request an opinion from that agency before you reached an opinion in this case?

2. If not, why not?

3. If so, what did the INS say?

The National Labor Relations Board (NLRB or Board) did not request an opinion from the Immigration and Naturalization Service (INS) prior to reaching a decision in Sure-Tan, Inc., and Surak Leather Company, 246 NLRB No. 134 (1979).

As indicated by the General Counsel's Motion for Clarification, the INS expressed its opinion on the issues involved in Sure-Tan to the General Counsel. According to the General Counsel, the INS' General Counsel indicated his concern about the Sure-Tan case, and stated his opinion concerning INS' view of the possible effect of the Board's Order in the case. Further, the General Counsel's Motion for Clarification sets forth effectively the arguments and possibilities concerning the effect of the Sure-Tan decision. Institutionally, a Board majority (including Member Penello) considered the issues adequately presented by the briefs and record in the case. It may also be noted that INS was aware that this case was before the Board, and chose to contact the General Counsel rather than submit an amicus curiae brief to the Board.

b. Member Murphy stated in her dissent that the majority decision "refused to consider how the enforcement of the National Labor Relations Act may be effectuated in such a way as to fit in with the implementation of the current goals of immigration policies." (Slip op. at 10). She felt that the Board's decision manifested an "overwhelming indifference and insensitivity to other federal law." (Slip op. at 10). What steps did you take to familiarize yourself with federal immigration policy? Do you consider yourself an expert in that field? How can you be sure of what the ramifications of your decision would be for that policy? Do you care?

The issue of harmonizing and accomodating the various federal laws relating to labor is a delicate one which has confronted the Board on several occasions. My expertise is in the field of labor relations, and specifically with the application and interpretation of the National Labor Relations Act (NLRA). By virtue of my position, I am charged with effectuating the purposes of the NLRA, which are to protect the rights of employees as defined therein. As rare or unusual cases come before the Board, I, like any other Board member, and as an attorney, attempt to the best of my ability to study and assimilate information on the facts and issues of that particular case. While I do not consider myself a so-called ''expert'' in federal immigration law, I am well aware of the President's, Congress', and country's concern over immigration policy. The simple answer to the question of whether ''I care'' about the impact of Board decisions on such policy is ''yes.'' But it is the duty of this Board to apply the NLRA to the cases that come before it. While mindful of the Supreme Court's admonitions in Southern Steamship, I am confident that the Sure-Tan decision adequately takes in the account those considerations. The Court's observations in N.L.R.B. v. Apollo Tire Co., Inc., are instructive on the question of expertise. The Court noted that were the NLRA held inapplicable to illegal aliens, employees would be encouraged to hire such employees to circumvent the labor laws, leading to more work for illegal aliens and the encouragement of violation of immigration laws. More to the point, the Court hesitated ''to require the Board to delve into immigration matters, out of its field of expertise.'' sl. op. at 5. The Court believed that questions on the status of an alien are properly before the INS. In a similar vein, the Court in Sure-Tan, 99 LRRM 2388 (7th Cir. 1978), stated that when the determination of the effect of labor laws on immigration policy involved ''speculation,'' the question should be left to immigration officials rather than to the Board, and the problem of speculation indicates why the courts themselves should not intervene to alter Congress' definition of an employee protected under the Act.

c. In her dissent, Member Murphy suggests that the Board should use its rulemaking procedure before deciding what is an appropriate remedy. (246 NLRB No. 134, slip op. at 13). That procedure would give parties who have knowledge of this area a chance to inform the Board of the ramifications of its policies. Don't you think that you could learn something by getting information from experts in this field?

The issue of the status of illegal aliens has been before the Board prior to the case under consideration here. See Lawrence Rigging, Inc., 202 NLRB 1094 (1973); Handling Equipment Co., 209 NLRB 64 (1974). Indeed, the question of alienage per se was raised during the original Wagner Act, and the Board has consistently held that ''... non-citizenship is neither a ground for exclusion from a bargaining unit nor a disqualificatin for participaton in elections conducted by the Board.'' See Don Logan and J.R. Paxton, Co-partners, d/b/a Logan and Paton et al, 55 NLRB 310 (1944). It cannot be forgotten that what is involved here is the effectuation of the statutory scheme as enacted by Congress to protect employees, as that term is defined. Certainly information from ''experts'' is useful to the Board; but where the issues are adequately presented to this Agency, and in order to discharge its duties quickly and efficiently, the Board will consider and issue its opinion on the question. Moreover, the compliance procedure is particularly well-suited for assisting in the resolution of difficult questions such as the one presented here, because it allows for the full development of the facts as they affect the individual parties involved.

d. The Board's General Counsel indicated that he did not understand the Board's order and that further compliance and enforcement proceedings would be confused unless a clarification was given by the Board. Here, the illegal aliens were deported. Doesn't the Board owe it to the agency and the courts to clarify what its policy is instead of leaving so much to the compliance proceeding? Application of normal compliance procedures does not seem adequate in a case like this, does it?

The opinion in *Sure-Tan* adequately and succinctly sets out the Board's policy concerning the issues involved. Thus, as stated therein:

> The Board is of the view that the remedial policies of the Act will be best effectuated in this case by affording the discriminatees full protection notwithstanding the circumstances attendant to their illegal discharge. They are to be offered unconditional reinstatement. The backpay period runs from the discriminatory loss of employment to the bona fide reinstatement offer. The usual procedures for handling the claims of missing discriminatees are to be used. Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly. In the event of long delays in locating the discriminatees, the backpay is to be placed in an escrow account for the normal 2-year period. As we indicated in our Decision [234 NLRB 1187 (1978)] and now reaffirm, the appropriate forum for implementing the Order is in the compliance proceeding. We particularly note that the General Counsel's motion is unaccompanied by any showing of an effort to make the necessary factual determinations as spelled out above. 246 NLRB No. 134, sl. op.2-3 [footnotes omitted]

Compliance procedures are suited for resolution of the factual questions often attending backpay and related cases.

e. If the dissent of Member Murphy is correct, the Board's order could obligate the employer to the illegal aliens indefinitely? If the alien has been properly deported, what is your view of the employer's obligation for a back pay to that person? Should not back pay stop as of the date the person is deported? If the deportation by the INS was wrong or improper, should not the burden be on the alien to make such a showing?

Member Murphy's dissent is incorrect. As stated in Sure-Tan, and mentioned above at (d), discriminatees who are found to be unavailable for work, including unavailability because of deportation, have their backpay tolled. The backpay obligation is also subject to the normal offset of interim earnings. Further, backpay runs from the discriminatory loss of employment until the bona fide offer of reinstatement. With respect to the burden of showing the propriety of deportation, I note Chairman Fanning's response to an inquiry from the Honorable Daniel K. Inouye:

> As you know, although a much debated issue, there is presently no federal statute prohibiting the employment of illegal aliens. In the absence of some such policy, and in view of the long-established principle that alienage itself is no bar to employment and its attendant rights under the National Labor Relations Act, the Board does not have any authority for distinguishing between legal and illegal aliens. An inquiry into and determination of an alien's unlawful presence in this country is not of the type to which our experience or expertise extends, and could involve us in possible conflicts with immigration authorities and tribunals. It could also result in constitutional problems. Moreover, as the Courts have noted, the application of the Act to aliens is to ensure that an employer cannot commit unfair labor practices with the knowledge that the Board cannot remedy them. If the Act is not applied here, employees could circumvent the labor laws and exploit workers. See Apollo Tire, (majority and concurring opinions).

f. Congress determined that illegal aliens should not be permitted to stay in this country. Do you have any idea what the impact of your decision would have on the domestic workforce, especially on young Blacks and legal Mexican Americans who have a high rate of unemployment? Member Murphy felt it was improper to leave such determinations for the compliance proceedings; do you disagree?

While I am, of course, concerned about the high rate of unemployment in the United States, especially among young Blacks and Mexican Americans, I know it is my duty to discharge my responsibilities of enforcing the NLRA. Congress has established the mechanism by which employee rights are protected, and decisions such as the one under scrutiny here are made pursuant to perceived Congressional directives. The majority in Sure-Tan, including myself, was sensitive to the unemployment issue and Member Murphy's contention. But, as we there stated:

> We note that it is Member Murphy who has presented national policy underlying the immigration laws as one-dimensional. She correctly states that competition between illegal aliens and natives for lower paid, lower status jobs often works to depress wages and working conditions. However, it may well be that the result of such competition is not necessarily or always detrimental to native workers. In this regard it has been argued that higher wages in certain industries may act to deprive natives of jobs by either driving the industry out of existence or by compelling major changes in technology.[8]

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[8] Piore, ''Illegal Immigration in the United States: Some Observations and Policy Suggestions,'' in ''Illegal Aliens: An Assessment of the Issues,'' National Council on Employment Policy (1976).

g. Some Board members seem to have a strange idea of which discharged discriminatees are available for work and who must be reinstated. Here, the aliens obviously would not be available for reemployment in the near future and yet the employer's obligation continues. A similar strange result occurred in M Restaurants, Incorporated, d/b/a the Mandarin, 238 NLRB No. 212 (1978). (Majority: Fanning, Truesdale; dissenting: Murphy). An employee who was illegally discharged from his waiter's job in San Francisco returned to Taiwan for about thirteen months and worked during that period before returning to the U.S. As part of the Board majority, you held that he must be given full United States back pay for the time he would have worked in Taiwan, minus the minimal wages he earned during that time. Member Murphy dissented and found that he was unavailable for work during the time he was in Taiwan and should receive no back pay for that period.

You would not consider using similar logic in the illegal aliens case as you did in the Mandarin case, would you, and hold that illegal aliens who are properly deported from the United States are nevertheless eligible for back pay for the period they are legally restrained from entering this country?

I hesitate to answer this question, since the precise factual issue has not been fully presented to the Board, or is pending on compliance. However, I reiterate that the result in The Mandarin case was not a novel or ''strange'' departure from law, as the Ninth Circuit Court of Appeals appreciated in its short affirmance and enforcement of the Board's Order. Further, concerning a properly deported alien's eligibility for backpay during his/her period of legal restraint, I point to the Sure-Tan decision: ''Discriminatees who are located but found to be unavailable for work (including unavailability because of enforced absence from the country) will have their backpay tolled accordingly.'' 246 NLRB No. 134, sl. op. at 2 (footnote omitted).

Bankruptcy Claims

Int'l Technical Products Corp., and its subsidiary, Rel, Inc.: Successors and Assigns of Rel-Reeves, Inc. and Parker-West Corp.: Successors and Assigns of Electronic Systems Div., Dynamics Corp. of America, 249 NLRB No. 523 (1980) (Majority: Fanning, Jenkins and Truesdale; dissent: Penello).

The Board majority (Fanning, Jenkins and Truesdale) held that the back pay liability of a predecessor employer is inherited and must be paid by a successor employer who purchases the assets of the predecessor in a bankruptcy proceeding, even though the federal court bankruptcy judgment states that the purchase is made "free and clear of all liens and encumbrances." To find otherwise, the majority stated, would be tantamount to relinquishing the Board's statutory obligation to remedy unfair labor practices and to proceed against a successor-employer in furtherance of that obligation.

Member Penello dissented. He stated that the majority opinion ran "roughshod over the Respondent's right under the Bankruptcy Act," and failed to interpret the NLRA in comity with other important Federal objectives.

Questions

I have no idea where the Board finds the authority for its order, which is directly contrary to leading Supreme Court precedent. In Nathanson v. NLRB, 344 U.S. 25 (1952), the Supreme Court ruled that a Board back pay claim is due no special priority in a bankruptcy proceeding. In his opinion, Justice Douglas (who certainly was no enemy of the American worker) stated that it did not follow that just because the NLRB is a federal agency that it has any special right to the assets of a bankrupt over any other creditor. Justice Douglas noted that the Board was collecting a claim for the benefit of a private party, not the government itself. He rejected the argument that "the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority payment." 344 U.S. at 28. He further held that the policy of NLRA is "fully served" by recognizing that the claim for back pay is one to be paid from the estate, with the question of the preference as to payment being one "to be answered from the Bakruptcy Act." (Id.)

As dissenting Member Penello stated, the Board cannot interpret its statute in a vacuum where its jurisdiction would interfere with the operation of another statutory scheme. In his view, the question was "whether the Board may make an end run around the Bankruptcy Act by attempting to enforce its back pay order even though the Bankruptcy Court has lawfully absolved the employer of that financial liability." (Slip op. at 23). The Board's order will make it more difficult for a trustee to sell the assets of the bankrupt company. And if the business does not continue, employees might be put out of work. Even if the business does not go out of existence, the sale may occur later that would otherwise be possible, with a delay in successor becoming a functioning employer.

a. How can you presume to require the payment of a debt from a purchaser of assets which a federal court has declared are free of all liens and encumbrances?

b. No other debtor presumably could claim to make such a demand, yet the Board does. The Nathanson decision says the Board has no more priority than any other debtor. Are you at all troubled by the possibility that the decision which you joined might be at odds with a Supreme Court decision?

c. Suppose one of my constituents bought a house for his family in a bankruptcy sale and the sale was supposed to be free of all liens and encumbrances? Would you think it would be fair if he were ordered to pay for some work that had been done on the house for the bankrupt by a plumber? Of course not--so why should the Labor Act be applied differently? The Supreme Court said it should not and that the Board has no special claims.

In International Technical Products Corporation, 249 NLRB No. 183 (1980), the Board was presented with a difficult issue requiring an accommodation between the National Labor Relations Act and the Bankruptcy Act. After careful consideration of the appplicable law, including established Board precedent, and relevant Supreme Court and lower court cases, I joined a majority of my colleagues in finding that a judicial sale free and clear of all liens, pursuant to the authority of a bankruptcy court, was not intended to extinguish and did not extinguish the backpay liability imposed upon a successor-employer for the unfair labor practices committed by its predecessor-employer.

In that case, the parties submitted a stipulated record which indicated that the Respondent, International Technical Products Corporation (ITP) had purchased the assets of its predecessor ''free and clear of all liens'' pursuant to a judicially approved bankruptcy sale. The parties further stipulated that ITP was a successor-employer and that it purchased the assets of the employing industry with knowledge that the unfair labor practices of its predecessor had not been remedied (backpay for discriminatorily discharged employees). ITP claimed that it was not liable to remedy the unfair labor practices of its predecessor because, as indicated previously, it had purchased the assets ''free and clear of all liens'' at a judicially approved sale.

The Board's decision was primarily premised upon Golden State Bottling Company, Inc., 414 U.S. 168 (1974). There the Supreme Court held that a successor-employer that acquires and operates in basically an unchanged form the business of a predecessor employer found guilty of unfair labor practices, and does so under circumstances which charge it with notice of the unfair labor practice findings against the predecessor is liable for remedying the predecessor's unlawful conduct.[1] In reaching our decision in *International Technical Products Corp.*, the Board also relied upon *Nathanson v. N.L.R.B.*, 344 U.S. 25, 30 (1951), wherein the Supreme Court pointed out that:

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[1] In Golden State Bottling, supra at fn. 2, the Supreme Court specifically adopted the rationale set forth in Perma Vinyl Corp., 164 NLRB 968 (1967):

> Perma Vinyl states the principles and their rationale as follows: ''To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.''
>
> ''In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, 'It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace.' When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability (continued)

> It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices. We think wise administration therefore demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination.

Thus, reading the principles of *Golden State Bottling*, *supra*, in light of *Nathanson*, *supra*, which points out that the Board, not the referee in bankruptcy or the court, has the authority to remedy unfair labor practices, a majority of the Board found that Respondent ITP's purchase of the assets of its predecessor after a bankruptcy proceeding did not extinguish ITP's obligation to remedy the unfair labor practices of its predecessor.

The Board further noted that, unlike a bankruptcy court order which only affects the assets of the bankrupt, a Board order enforces a public right and reaches beyond the assets of an employer and attaches to the employing entity itself. In order to vindicate the public right and eradicate the adverse effects of a wrongdoer's conduct, it is essential that a respondent fully comply with the remedial provisions of a Board order. Consequently, a Board order cannot be simply classified as a lien or encumbrance, and a court-approved purchase ''free and clear''

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[1] for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.'' 164 NLRB 968, 969 (footnotes omitted).

of all liens is not therefore intended to extinguish or modify the liabilities arising from a Board order. Accordingly, we found that in light of the specific language cited in Nathanson, supra, the Federal District Court that approved ITP's purchase of the assets free and clear of all liens had not intended its approval of the sale to modify or affect the Board's order requiring ITP, as a successor, to remedy the unfair labor practices committed by its predecessor.

I would also point out that the regulatory scheme of the National Labor Relations Act expressly includes ''trustees in bankruptcy [and] receivers'' within the statutory definition of a person subject to the statute (Section 2(1) of the Act). Although the bankruptcy court may have exclusive jurisdiciton over the debtor and his estate for certain purposes, it is ''absolutely certain'' that ''the supervision of the bankruptcy court does not free [an entity involved in bankruptcy proceedings] from an employer's obligation'' under the National Labor Relations Act. 1 Collier on Bankruptcy, paragraph 2.36 [3.4] at 254 n. 32 and accompanying text. It is also clear that the Bankruptcy Code ''does not authorize a debtor in possession to ignore its obligations under the Labor Act anymore than it can ignore those imposed by the Internal Revenue Code.'' See Shipmen's Local 433 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975). Finally, ''[t]he jurisdiction of a United States District Court in bankruptcy does not embrace the power to treat with a debtor's unfair labor practices which affect commerce.'' N.L.R.B. v.Baldwin Locomotive Works, 128 F.2d 39, 44 (3d Cir. 1941).

In my view, this precedent argues persuasively in favor of a conclusion that a bankruptcy court does not have authority to set aside a Board order remedying unfair labor practices. Hence, as set forth above, the Board's order in International Technical Products Corporation was not in conflict with the judicially approved sale ''free and clear of all liens'' because the Federal District Court order was not intended to modify or affect the Board's order.

As I have indicated previously in my view, and I might add in the view of a majority of my co leagues, the Board's decision in International Technical Products Corp, is not at odds with the Supreme Court's decision in Nathanson. On the contrary, our decision in International Technical Products Corp. is consistent with Nathanson as well as other Supreme Court cases governing the issue involved here.

In response to your question regarding the purchase in a bankruptcy sale of a house supposedly free and clear of all liens and encumbrances: I do not pretend to be an expert in all of the intricacies of bankruptcy law, and where such a question does not require an accommodation with the Labor Act, I do not think it would be appropriate for me to venture a legal opinion. However, in passing, I note that under various laws and regulations regarding mechanic liens such a purchase, under certain circumstances, might not be free and clear of an unregistered mechanic's lien. With regard to your question concerning the interfacing of the NLRA and the Bankruptcy Act, I believe my previous answer fully responds to your question.

Orders To Turn Over To Unions EEO Data Protected From Disclosure By Other Statutes

Westinghouse Electric Corporation, 239 NLRB No. 19 (1978) (Majority: Fanning, Jenkins, Truesdale; Concurring and dissent: Murphy).

The East Dayton Tool and Die Co., 239 NLRB No. 20 (1978) (Majority: Fanning, Jenkins, Truesdale; Concurring and dissenting: Murphy)

Automation & Measurement Division, the Bendix Corp., 242 NLRB No. 8 (1979) (Fanning, Jenkins, Truesdale; Concurring and Dissent: Murphy);

White Farm Equipment Company, 242 NLRB No. 201 (1979) (Majority Jenkins, Truesdale; Dissenting in part: Murphy);

The Bendix Corporation, 242 NLRB No. 170 (1979) (Majority: Penello, Truesdale; Dissent: Murphy);

General Motors Corp., 243 NLRB No. 19 (Majority: Fanning, Truesdale, Dissent: Murphy);

Kentile Floors, 242 NLRB No. 15 (1979) (Majority: Penello, Truesdale, Dissent: Murphy).

[Petition for Review and Applications for enforcement of several of these cases have been argued and are awaiting decision by the District of Columbia Circuit].

All of these cases involved union requests that employers furnish them with certain types of equal employment information such as: Charges and complaints filed under state and federal anti-discrimination statutes, workforce analyses prepared for the Office of Federal Contract Compliance Programs and data concerning the race and sex of applicants for employment. When the employers refused to turn over various types of such data to the Union, the Union charged, and the Board agreed, that the employer had unlawfully refused to bargain. The Board ordered disclosure of the information. The Board appeared to be unconcerned with arguments that such information was confidential under various statutory or regulatory policies, or that the information involved sensitive commercial or financial information which could cause competitive harm to the employer if the information was released. Moreover, with respect to applicant information, the Board ignored the fact that the employer's hiring activity was beyond the Union's responsibility under the collective bargaining agreement and the Labor Act.

Member Murphy dissented from the Board's orders requiring the release of such information to the Union. In her view, the Board' orders would interfere with the safeguards against the release of such information that are found in other federal statutes and regulations.

Questions

a. In Detroit Edison Co. v. NLRB, __ U.S. ___, 99 S. Ct. 1123, 1132 (1979), the Supreme Court stated that the Board sometimes takes the incorrect position that "union interests in arguably relevant [bargaining] information must always predominate over all other interests, however legitimate." These EEO data cases seem to indicate that you do not recognize that employers have the right to have some types of data withheld from the unions. I wonder if there are any limits you would place on union demands for information? For example:

1. Suppose the employer said it could show such information could cause competitive harm if it was turned over to the Union. To illustrate, work force analyses often contain detailed manning information that might be useful to an employer's competitor. Would you consider that the employer's concerns were relevant? Your decisions apparently don't recognize such relevance.

2. What could you do, if anything, to prevent the union from giving such information to a competitor of the employer?

3. Do you have any expertise to judge whether such information contains technical commercial trade secrets? If not, how could you discount the employer's statement that such information is sensitive?

4. The federal rules of civil procedure recognize that protective orders can be given against plaintiffs to make sure that sensitive information isn't released to the public? The Board can't give such protection, can it?

The cases that you cite relative to an employer's obligation to provide a union with certain EEO data do not reflect a willingness on the part of the Board to require disclosure indiscriminately of all related data requested by unions. As you point out, the recent Supreme Court opinion in *Detroit Edison Co. v. N.L.R.B.*, 99 S. Ct. 1123 (1979), regarding the duty to provide information requires a balancing of union interests and other interests, including those of employers and employees.[1] Such a balancing is reflected in the EEO data cases you cite. For example, in the circumstances presented, the Board denied union requests for employer affirmative action plans,[2] a request for certain information on insurance concerning non-bargaining unit employees,[3] and a request for copies of reports filed under Executive Order 11246.[4] Additionally, the Board specifically held that a union was not entitled to the names of employees filing EEO charges,[5] or to demand disclosure of the ''reasons'' for an employer's failure to hire more Black and female employees.[6]

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[1] The Board decision in *Detroit Edison*, 218 NLRB 1024 (1975), in which I did not participate, required the employer to disclose copies of aptitude test battery and answer sheets directly to the union while prohibiting the union from taking any action that might cause the tests to fall into the hands of employees who had taken or were likely to take the tests. The Court found the condition imposed by the Board insufficient to protect the interests of the employer in test secrecy and instead permitted the employer to condition disclosure on the consent of the tested employee.

[2] *Westinghouse Electric Corporation*, 239 NLRB 106 (1978), *Automation & Measurement Division, The Bendix Corporation*, 242 NLRB No. 8 (1979), *General Motors Corporation*, 243 NLRB No. 19 (1979).

[3] *The East Dayton Tool and Die Co.*, 239 NLRB 141 (1978).

[4] *The Bendix Corporation*, 242 NLRB No. 170 (1979).

[5] *Westinghouse Electric Corporation*, *supra*, *General Motors Corporation*, *supra*, *The Bendix Corporation*, *supra*.

Most importantly, the Board has not been oblivious to claims by employers that production of EEO and other data may be unduly burdensome. This concern was specifically addressed in *Westinghouse Electric Corporation*.[7] Moreover, in response to such a concern on the part of employers the Board has long held that the unavailability of data requested by a union or the unduly burdensome nature of providing certain data is an important factor to be considered in assessing a party's compliance with its obligation to provide data relevant to collective bargaining.[8]

I would note in passing that the bargaining obligation of unions to which the requested data in the subject EEO case is potentially relevant is not one of minimal importance. As the Supreme Court stated in *Emporium Capwell Co.* v. *Western Addition Community Organization*,[9] ''national labor policy embodies the principles of nondiscrimination as a matter of highest priority.'' Unions have a statutory and, in many instances, a contractual obligation to represent fairly the interests of all employees in the bargaining unit, including minorities. And,

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[6] *The East Dayton Tool and Die Company*, *supra*, *The Bendix Corporation*, *supra*, *White Farm Equipment Company, A Subsidiary of White Motor Corporation*, 242 NLRB No. 201 (1979).

[7] 239 NLRB 106 at 113. In *Westinghouse*, the Board found that the majority of the requested data was already contained in documents compiled for other purposes and accordingly was neither unavailable nor burdensome to provide. The parties were required to bargain about the accessibility of the remainder of the information requested and the cost of compiling it.

[8] See, for example, *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382, 389-390 (1971), and *The Cincinnati Steel Castings Company*, 86 NLRB 592 (1949).

breach of its duty of fair representation may subject a union to a suit for damages, an injunction, or revocation of its certification of representative.

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[9] 420 U.S. 50, 66 (1975).

In questions 1-4 you pose the issue of union requests for information which may arguably constitute employer trade secrets. As you know, this issue is now before the Board in three cases on which the Board heard oral argument in January 1980.[10] Since I have participated in deliberations on these cases and may participate in their disposition, if reconfirmed before their issuance, it would not be appropriate for me to comment with specificity on these four questions at this time.

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[10] Borden Chemical, A Division of Borden, Inc., Case No. 32-CA-551; Colgate-Palmolive Company, Case No. 17-CA-8331; Minnesota Mining and Manufacturing Company, Case Nos. 17-CA-5710 and 18-CA-5711.

b. Title VII prevents the EEOC from releasing to the "public" investigatory data which it collects prior to instituting a Title VII lawsuit against an employer. If the EEOC could not release such information to the public, how can the Board require an employer to give to the Union copies of EEOC charges or complaints? It seems to me that the Board should respect Congress' determination that this type of data cannot be released to the public. Surely, we did not contemplate that agencies other than EEOC would try to order the disclosure of the precise type of information that EEOC itself could not release.

The question of the confidentiality of EEOC charges and complaints under Title VII of the Civil Rights Act and EEOC regulations is specifically addressed in _Westinghouse Electric_, _supra_. Although such charges and complaints are not presumptively relevant to a union's bargaining obligation, the Board found in _Westinghouse_ that, on the particular facts of that case, the Union had demonstrated its need for such data. As the Board noted there, the cited confidentiality provision was binding only on the governmental agencies involved and not on private parties. Nevertheless, the Board considered Respondent's asserted defense of confidentiality in light of the disclosure regulations applicable to the EEOC, and concluded that such confidentiality was sufficiently safeguarded by deleting the names of the charging parties from the list of complaints and charges provided to the Union.

c. If the Union has the support of its members, why can't it ask them to provide it with copies of charges and complaints they have filed? If they won't turn these over to the union, maybe they have good personal reasons for not doing so. Would not this be a better approach for the Board to take than to order the employer to release information that EEOC coulu not turn over to the union?

Unions requesting that they be provided with copies of EEOC charges and complaints do so for a variety of reasons, not the least of which are pinpointing areas of complaint among bargaining unit members and determinating if unit terms and conditions of employment may be affected by actions of the EEOC. Unfortunately, we cannot be sure that these interests would be sufficiently served by a union poll of its own members as you suggest.

Whatever control a union may exert over its own members, as you know all employees in the bargaining unit may not be union members. Accordingly, the information union members might provide would not necessarily enable the union to fulfill its duty to represent all employees in the bargaining unit, both individually and as a whole. Thus, it is appropriate to require the employer, as repository of all the charges and complaints, to disclose them to the union while, as provided in Westinghouse and other cases, the identity of the charging parties is not revealed. I would note that the scheme of voluntary disclosure by individuals that you propose would expose the identity of the charging parties, a result I do not feel is necessary or desirable.

d. The Trade Secrets Act, 18 U.S.C. § 1905, imposes criminal sanctions upon any Government officer or employee who makes known in any manner or to any extent not authorized by law any information submitted to the agency "which information concerns or relates to trade secrets, processes, operations, type of work ... [or] confidential statistical data.

With respect to work force analyses submitted to the OFCCP, the Supreme Court ruled in Chrysler Corp. v. Brown, ___U.S.____, 99 S. Ct. 1705 (1979), that the OFCCP's own disclosure regulations did not constitute the requisite "authorization" to permit the release of such information, assuming such data contained information protected from disclosure from the Trade Secrets Act.

If OFCCP's own regulations would not permit such disclosure, and if an inquiry into whether trade secrets are contained in work force analyses was relevant in Chrysler, why does not the Board feel such considerations are relevant, and why does the Board think that its statute permits it to disregard the Trade Secrets Act. The NLRA is not a disclosure statute, and provides no authorization to order such release of information.

Again, as I noted above, three cases involving disclosure of trade secrets are currently pending before the Board. Hence, I feel that it would be inappropriate for me to comment in any but the most general fashion on that issue. I would note that Chrysler Corporation v. Brown, 99 S. Ct. 1705 (1979), deals with a fairly narrow issue of statutory interpretation concerning the ability of federal agencies to reveal information obtained in the exercise of their functions. Thus, it is not dispositive of the question of the appropriateness of requiring private employers to provide certain data to unions as part of their duty to bargain collective under the National Labor Relations Act. Clearly, however, the mere fact that the Board held oral argument in three cases concerned with the confidentiality of alleged trade secrets indicates that it finds such considerations relevant.

RESTRICTING THE RIGHTS OF INDIVIDUAL EMPLOYEES TO SELECT THEIR OWN BARGAINING REPRESENTATIVE OR TO REFRAIN FROM ENGAGING IN UNION ACTIVITIES

I think we can all agree that one of the Board's primary concerns should be to protect the Section 7 rights of employees. The Act permits employees to engage in labor-related activities or to "refrain" from taking part if they don't want to. They should be able to have an unassailable right to select their bargaining representative, and to oppose their union if they disagree with it. You agree with me, don't you Mr. Truesdale, that not only employers, but also the Board and Unions should strongly support and uphold these principles.

But some of the majority decisions you have supported seem to me to be at odds with these principles. I would like to discuss these decisions to see whether they can be reconciled with the rights of all employees to be able to select their bargaining representative, and to do so without being unfairly coerced by the union.

Union Fines

Amalgamated Meat Cutters and Allied Workers of North America, Local 593, 241 N.L.R.B. No. 93 (1978) (Majority: Fanning, Jenkins, Truesdale; Dissent: Pennelo and Murphy).

In this case the Board evidenced an intention to protect the interests of the union over the rights of employees to refrain from such activities. Along with Members Fanning and Jenkins, you ruled that it was not illegal for the Union to pass a resolution which threatened disciplinary action (not limited to expulsion) against Union members who did not support, assist or cooperate with the Union's organizing drive at the employers' stores. You and the other members of the majority held that the resolution promoted the Union's legitimate interest or organizing unrepresented employees, which you considered a basic goal of labor organizations.

But Members Penello and Murphy dissented, arguing that those concerns were outweighed by the possibility of coercion of employees in the choice of their bargaining representative.

Questions

1. Aren't there limits to which Unions can go to achieve membership? Shouldn't employees have full freedom to exchange views and ideas on the subject of union representation without having to fear being fined or expelled from the union just because they express their own views?

Before addressing your specific questions about Amalgamated Meat Cutters and Allied Workers of North America, 237 NLRB 1159 (1978), it may be helpful to provide some background about the sensitive area of internal union discipline of its members. The seminal case on this question is the Supreme Court's decision in NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175 (1967). The Court there held that a union did not violate 8(b)(1)(A) of the Act by fining members for crossing a picket line during a strike. The Court did not deny that the fine was coercive; nor did it deny that employees have a Section 7 right to refrain from union-sponsored activities free of coercion. However, the Court held that in enacting the proviso to 8(b)(1)(A), Congress sought to insulate internal union discipline from the general proscription against union restraint and coercion. Referring to the relationship between a union and its members as a contractual one, the Court explained that employees necessarily surrender some of their rights through their voluntary association with a labor organization. The Court went so far as to state, ''. . . the repeated refrain throughout the debates on 8(b)(1)(A) and other sections [was] that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.''

Although it has recognized and observed the strong congressional mandate in favor of generally exempting internal union discipline of members from the reach of the Act, the Board has, in certain circumstances, found 8(b)(1)(A) violations against unions for imposing fines. Thus, the Board has held that the proviso to 8(b)(1)(A) does not sanction union discipline of a member when such discipline would constitute a violation of another provision of the statute. This holding was most recently reiterated in a decision that issued during my term, Alameda Glass Company, 242 NLRB No. 134 (1979), where the Board held that a union could not fine members for refusing to cross a picket line at a neutral employer because that would contravene the Section 8(b)(4) proscription against secondary boycotts. It is also well settled Board precedent that a union may not use discipline to affect a member's employment, and that members may not be fined in retaliation for using the Board's processes. Thus, an employee-member is free to file a charge against a union or a decertification petition without fear of reprisal. I in fact participated in one such decision early this year. See Elcon Pipe Fitters, 247 NLRB No. 29 (1980).

Other than these few exceptional situations the Board has recognized that the proviso to 8(b)(1)(A) bars any interference with a union's right to prescribe rules for its membership so long as such rules serve a legitimate union interest. It may be that in certain circumstances, a union's imposition of such rules is detrimental to the pursuit of other employee rights, but this is the balance Congress struck in 1947. One must assume in this connection that Congress was mindful that unions need to govern their membership, and further mindful that under the Act, union membership, as opposed to the mere payment of dues under a union security arrangement, is not compulsory.

With this background let me turn to the decision in Amalgamated Meat Cutters. There the Board was presented with an unusual situation. The union was seeking to represent a certain unit of the employer's employees. A few of the employees involved were members of the union before the campaign began. There was no evidence that these few union members joined the union involuntarily; nor was there evidence that they were prevented from resigning their membership. The union promulgated a resolution requesting its members to assist the organizing committee and stating that members who failed to support the organizing effort when so requested, or who actively opposed the union's organizing activities would suffer disciplinary action, not limited to expulsion. There is no record evidence that any discipline under this rule was, in fact, imposed.

The competing interests raised in this case are obvious. There can be no doubt here, as there was no doubt in Allis Chalmers, that the threat of discipline in the union's resolution might inhibit the exercise of employee rights to refrain from union activity. However, simply to state that there is a Section 7 interest involved, does not answer the question in the case since, as noted previously, Congress passed the proviso to 8(b)(1)(A) to exempt traditionally imposed internal union discipline from the 8(b)(1)(A) prohibition against restraint or coercion.

This does not mean that the union resolution in Amalgamated went unscrutinized, for a union cannot pass any resolution it wishes in the guise of internal union affairs and hide behind the

8(b)(1)(A) proviso. Thus the majority first examined the resolution to determine if it served a legitimate union interest. It is difficult to imagine a more legitimate union goal than organizing, just as it is difficult to deny the right of a union to expect its members to support such efforts. The dissenters in Amalgamated never disputed the majority's assertion that ''organizing employees is a basic goal of labor organizations and hence employees in joining such an organization have acted in accord with this goal, and tend to share reciprocally, either directly or indirectly, in any benefits accruing therefrom.'' 237 NLRB at 1161. The majority also noted that the enforcement of the union's resolutions would not interfere with a member's employment, would not violate any other provision of the Act, and would not impair access to the Board.

Thus, the Board was faced with a traditional and legitimate internal union provision which did not present the special problems in which the Board has found 8(b)(1)(A) violations. In this context, noting that the union rule in Amalgamated only required members to act consistently with their voluntary membership; that they were free to resign and campaign against the union; and that the members were free to vote their choice in the election, the majority's refusal to find a violation in the promulgation of the rule was consistent with the Board's traditionally cautious approach in this area - an approach mandated by the proviso to 8(b)(1)(A) and its legislative history.

I agree with you that there are definite limits beyond which unions may not go in seeking to gain members. Unions are not free to threaten, restrain, or coerce employees in any way in an effort to induce them to join, and the Board has frequently so held. For example, a union may not induce employees to sign union authorization cards by promising initiation fee waivers prior to the election. NLRB v. Savair Manufacturing Co., 414 U.S. 270 (1973). It should also be noted that under a union security clause, an employee can be compelled to meet his dues obligations only; he may not be compelled to join the union. NLRB v. General Motors Corporation, 373 U.S. 734, 742 (1963). This, however, was not the issue in Amalgamated as the members there joined voluntarily, and the only question was whether their membership could subject them to a union rule mandating support for the union in its organizing drive.

2. **Why should employees who want to criticize or oppose the union be fined for exercising those rights? To permit a union to fine members who don't "support .... the organizing activities" of the Union seems to give the union a vague but very broad authorization to compel support for its organizing tactics, no matter the approach or methods used.**

Your question here, and in part of question 1, essentially challenges the result reached in Amalgamated by emphasizing the importance of a free exchange of views during organizing campaigns and of the Section 7 rights of employees to support or oppose a union. My votes in cases such as General Knit attest my agreement with your concern with a free exchange of views, and with the assurance that elections are held under ''laboratory conditions.'' However, as I have set out in more detail above, the concern you address was raised in a most unique posture in Amalgamated, as it ran head-on into the proviso to 8(b)(1)(A)--granting unions the right to prescribe legitimate rules for its members. The basis and need for this proviso has been discussed. I will only emphasize that the contractual relationship between a union and its members involves reciprocal benefits and obligations. As in any contract one cannot pick and choose among the provisions. So long as an employee joins a union voluntarily, remains free to resign, and the union operates democratically, as it must under the law, it is hard to see the real coercion in the promulgation of a rule requiring members to support a union's legitimate campaign activity. As was emphasized in Amalgamated, the employee-members ''were free to resign any time the union [set] out on a course they [did] not agree with.'' Also, the union's rule in Amalgamated obviously did not affect any member's freedom of choice in the voting booth.

3. Suppose some of the union's members disagree with organizing tactics or approaches. Should they be fined for saying so? Doesn't this inhibit their free speech rights? Why shouldn't the union be required to sell its approach to employees, rather than permitting it to coerce support?

4. In the case I'm discussing, it's not a situation where the union is acting as the employee's bargaining representative; rather, its trying to obtain support so that it can become the representative. Isn't there a difference between these situations? Shouldn't the employees have more freedom to select their representative than this case would permit?

5. Doesn't a decision such as this one attempt to apply the labor laws to protect entrenched unions rather than permit employees to exercise free choice? That seems to be directly contrary to the purpose of the NLRA which is to protect individual employees.

Again, while you raise the concern of the union's rule and its impact on free speech and employee rights, I believe the proviso to 8(b)(1)(A) creates a special circumstance, and further reemphasizes that the ability of members to join or resign voluntarily strongly mitigates any real free speech problems.

6. The Board often finds that employers have committed Section 8(a)(1) violations when the conduct which assertedly coerces the employees is only a minimal violation. But here you failed to find a violation when the Union's conduct was plainly coercive and had the potential for having a strong negative impact on the freedom of the employees to exercise their Section 7 rights, and was way above the coercive level where the Board finds employers have committed violations. How do you justify this difference in treatment of employers and Unions?

To the extent your question suggests otherwise, the Board does not accord favored treatment to either unions or employers in determining if there has been a violation of the Act. As I have said repeatedly during these hearings, my evenhandedness is well documented in my 2,500 decisions. Your concern that the Board would have found a violation here if the coercion had been committed by an employer is unfounded and misses the point of my rationale. In this connection, there is no counterpart to the 8(b)(1)(A) proviso in 8(a)(1). While the enforcement of internal union rules may by statute be exempt from a 8(b)(1)(A) violation, although coercive, enforcement of ''internal employer rules'' that are coercive have no statutory exemption.

Union Affiliation Votes

Amoco Production Company, 239 N.L.R.B. No. 182 (1979) (Majority: Fanning, Murphy, Truesdale [special concurrance]; Dissent: Jenkins and Pennello); and

Providence Medical Center, 243 N.L.R.B. No. 61 (1979) (Majority: Fanning, Murphy, Truesdale; Dissent: Jenkins and Pennello).

Several Board cases have involved a fundamental question of Union democracy and fairness: Whether all employees in a bargaining unit have the right to vote on whether a local independent collective bargaining representative should affiliate with a large national union, or whether the vote can be restricted to only union members? These are not Board conducted elections, but are run solely under union control. Because of the change in Board membership in 1977, there was a double reversal of Board position on this question, with you taking the most extreme position against permitting all employees the right to vote. By taking this position you have injected a good deal of inconsistency into the law.

The early Board position was that the Board would permit a vote to affiliate with a larger union even if bargaining unit employees who were not members of the Union were excluded from voting. North Electric Company, 165 N.L.R.B. 942 (1967). Member Fanning joined the majority opinion.

Members Jenkins and Zagoria dissented, arguing that denying all unit employees the opportunity to vote violated minimal standards of due process. Member Jenkins and Fanning have been consistent in their positions.

But in 1977, the Board membership had changed, and with it so did the Board's position. In Jasper Seating Company, Inc., 231 N.L.R.B. 1025 (1977), Members Jenkins and Walther refused to accept an affiliation vote because nonmembers had been denied the opportunity to participate in the election. Member Penello found that a question concerning representation such as this could only be resolved in a Board-conducted election in which all employees could vote. He reasoned that the identity of the employees representative had been modified substantially because the employees were now subject to the International's constitution. Chairman Fanning and Member Murphy continued to treat such votes as an internal union matter and would have permitted the union to deny the vote to nonmember employees.

But in 1979, you, Member Truesdale (who had replaced Member Walther) disagreed totally with your predecessor's position, and lined up with Chairman Fanning and Member Murphy to cause another reversal of Board law within a little more than two years. In Amoco Production Company, 239 N.L.R.B. No. 182 (1979), the Board permitted an affiliation to occur even though nonmembers were excluded from voting.

But you wrote a concurring opinion in which you disagreed with the other members of the majority insofar as they relied on extenuating factors, such as the fact nonmembers were permitted to join the union on the eve of the election and were invited to attend meetings where the affiliation vote was discussed. In your view, nonmembers simply have no right to have their interests represented in such elections. Your position thus represents the extreme position on the Board denying such voting rights.

This position can have absurd results, as demonstrated in a later 1979 decision in which you were in the majority, over the dissents of Members Penello and Jenkins. See Providence Medical Center, 243 N.L.R.B. No. 61 (1979). There the N.L.R.B. permitted a union-conducted affiliation vote to stand even though only 307 out of 700 employees (i.e., 44 percent) were union members and thus eligible to vote. Of those 307, only 220 actually voted. In other words, 31 percent of the employees in the bargaining unit were able to decide whether or not to affiliate with the Retail Clerks International Association, a large, national union.

Questions

1. Here again, we have the Board reversing its field in a short period of time. To which Board's expertise are we to give deference, the one existing in 1977 or the one in 1979?

2. As Member Jenkins said in North Electric Company, doesn't it appear incongruous that the Board spends much of its time closely scrutinizing whether employer or union conduct in a preelection period may have interfered with the freedom of choice of employees who voted and yet condone and ratify the "complete disenfranchisement" of bargaining unit employees "who were not afforded the opportunity to vote because they were not union members." 165 N.L.R.B. at 944? Couldn't some of the time you spent applying the General Knit doctrine to analyzing election representations be better spent looking at how these affiliation votes deny voting rights to bargaining unit employees?

3. An affiliation vote can have serious consequences:
   a. the unit employees might be subject to an entirely new set of union bylaws, constitution and disciplinary procedures;
   b. the unit employees might have their vote diluted by being merged with a much larger union;
   c. the local unit might be substantially controlled by the international union, even if present local officials remain in office; or
   d. the new affiliation might result in a change in how a strike can be called; who must participate in a strike; whether nonstrikers can be fined; what the grievance procedures will be; and whether there will be a union security clause.

These changes might have a great impact on nonunion employees who have had no say in their adoption, but who still are supposed to be represented by the bargaining unit representative.

   a. In light of this, how can you adopt the position that nonunion employees have no interest in these matters, and that it is exclusively a matter of internal union concern?
   b. Why shouldn't the N.L.R.B. conduct an election in these cases to make sure that the rights of all employees are recognized? Isn't the Board supposed to represent the interest of all employees and not just union members? Isn't your position inconsistent with that function?

c. in American Bridge Division, United States Steel Corp., 457 F.2d 660 (3d Cir. 1972), the Third Circuit set aside the affiliation of a local independent labor organization with the United Steelworkers. Control over the rights of its 300 members was transferred to an international union with over 1,120,000 members. The Court also found that the employees would be subject to the international's constitution, strike rules and grievance procedures. Because of these factors, the court reversed the Board and found that certifying this union as the representative of the employees was improper because it ignored the interest of a majority of employees in the bargaining unit.

Do you disagree with the holding of the Third Circuit and the position of Member Penello that when affiliation would have a substantial impact on the rights of unit employees that all employees should have a right to vote in a Board-conducted election?

4. If not, aren't you troubled by the fact that such important changes can be made without the employees being able to participate?

5. Doesn't your position tend to coerce employees to join the union, rather than being a neutral position which would merely protect the opportunity of employees to participate or

not participate in union affairs, which is their right under Section 7 of the Act?

6. Sometimes union rules have an open season for union membership. Would you adhere to your position in these affiliation cases if there was no opportunity for nonmembers to join the union between the time of the announcement of proposed affiliation and the actual vote?

7. In Amoco Production Company, 239 NLRB No. 182, Members Fanning and Murphy at least felt it was important to mention that the union gave nonmembers a chance to join the election before the affiliation vote. Why did you state in your concurring opinion that such a factor was not important?

8. In your concurring decision in Amoco Production Company, you state that the affiliation with a national union does not affect the employment relationship or the union's bargaining obligation because all unions have the same duty of fair representation. 239 N.L.R.B. No. 182, slip op. at 8. Do you really feel that unions are fungible, and that there really aren't any differences between them that would be important to all unit employees?

9. In that same opinion, you state that there is "little difference between a union affiliating with another labor organization and an employer affiliating with an employer association." 239 N.L.R.B. No. 182, slip op. at 8. Doesn't such a view completely disregard the rights of employees to make their own choice of bargaining representative?

9. Doesn't it appear that your failure to see that there are differences between labor organizations, between small in-plant unions and national unions and between unions and employer associations, is evidence of a lack of practical knowledge of how labor organizations actually work?

As I said at the hearing before this Committee on September 5, it is inappropriate for me to respond to your questions in the area of union affiliation votes, as the Amoco case, which raises these same questions, is before the Board on remand from the Fifth Circuit.

DECISIONS WHICH GIVE UNION OFFICIALS UNFAIR EMPLOYMENT ADVANTAGE TO THE DETRIMENT OF OTHER EMPLOYEES IN THE BARGAINING UNIT

Although union officials should not be impeded in their lawful functions, they also should not be given any special privileges beyond those reasonably necessary to carry out their collective bargaining representative functions. Unnecessary special privileges could reward them, to the detriment of other employees' lawful and proper employment rights. There are several decisions which you have made which are contrary to these principles and which should be discussed.

Broadening Union Power in Exercise of Appointment of Steward Clauses

A particularly disturbing trend in your decisions is the tendency to raise the "rights" of unions over those of employees. This is exemplified by your swing votes in the "appointment of steward" cases.

An "appointment-of-steward" clause gives the union the right to tell the employer to recognize, or even to hire, a particular person as steward on a job, and may be validly applied in a situation which causes another employee to be laid off or discharged. But Board precedent, until you changed it, held that such an application raised an adverse presumption that the union was unlawfully discriminating against employees or causing the employer to do so. The union could rebut this presumption by an affirmative showing that the invocation of the clause was necessary to the union's performance of its representative function.

However, in The Paintsmiths, 239 NLRB No. 192 and United Brotherhood of Carpenters and Joiners, Local 49, 239 NLRB No. 191, you joined Chairman Fanning and Member Jenkins in holding that the unions in those cases could lawfully force the employer to hire their designated stewards, although in both cases that action would require the layoff of other employees, and although the unions did not show that such action was necessary to their representative functions, and in fact could have appointed stewards from the existing work forces. (It is noteworthy that in Paintsmiths the union business agent insisted that the employer

hire his own brother as steward, and in Local 49, one of the union's officers was already employed at the jobsite and was capable of performing as a steward.)

How can you justify giving unions the power to exert such drastic control over employers' hiring policies, as well over the employment of other workers, in the absence of a strong showing by the union that there are special circumstances which necessitate such incursions into the interests of such persons?

In Paintsmiths, 239 NLRB 1378, and Scott and Duncan, 239 NLRB 1370, the Board was faced with a delicate balancing of interests. The employers in those cases desired to make certain hiring decisions at their construction sites. The unions desired to enforce a contractual commitment entered into by the employers, whereby the unions had the right to appoint a steward at the jobsite. Yet a third consideration was the legitimate interest of employees already on the job in continuing their employment. In both cases, but for a breakdown in communications between the union and employer, a steward could have been appointed initially to fill a vacancy.

In both cases, I agreed that the appointment-of-steward clauses served a legitimate objective of attempting to insure that the collective bargaining agreements would be policed by individuals who were more independent of the employers and, therefore, more inclined to insist on the enforcement of trade rules than would be expected of persons who were regularly employed by the employers. A brief description of the facts in each case may be helpful.

In Paintsmiths, the union requested that the employer inform it when work began on the site so that a steward could be designated. The employer failed to so notify the union and, several weeks after work had begun, the union business agent visited the site. There, he observed that a painter was in violation of a union trade rule and that neither the foreman nor the other painter on the site--both union members--were taking steps to enforce the trade rule. The B.A. left a message for the employer informing it that a steward would be designated. The first steward designated was the B.A.'s brother. I mention this because it has proved to be a red herring for some readers of the Board's opinion. There was no allegation or evidence in the case that the B.A. exercised any favoritism in designating stewards, and the record showed that the B.A. came from a long line of painters and was related by blood or by marriage to over 100 individuals working in the painting trades in that city.

In any event, the B.A. instructed employees at the site not to work without a steward, and the employer finished the job after going through four stewards.

In Scott and Duncan, the Union had refrained from designating a steward during a time of reduced employment at the jobsite. However, the union informed the employer that it desired to fill the next vacancy with a designated steward. Despite this notice, the employer made a commitment to hire another union member who happened to be at the joosite at the time the next vacancy arose. Before the newly-hired employee began work, the union learned of the vacancy and reminded the employer of its commitment to hire the designated steward. When the employer declined to honor that commitment, the union sought and obtained relief through the contractual grievance procedure. I might add here that the arbitrator in this case expressly confined himself to the contractual issue and did not consider whether the appointment-of-stewards clause was lawful. The Board adopted without comment the ALJ's recommendation that the Board decline to defer to the award. The result of the award was that the employer paid back pay to the steward who would have worked at the site.

On appeal, the Eighth Circuit denied enforcement of Paintsmiths, with a vigorous dissent by Circuit Judge McMillian. Although the majority of the court panel concluded that the appointment-of-stewards clause was facially valid and did not foreclose the possibility that the Board could articulate a rationale to support a finding of lawfulness in this case, it found that the Board had not sufficiently articulated the process by which it weighed the conflicting interests present. The court further suggested that less justification would have been required had the steward been appointed to fill a vacancy instead of bumping an employee. Indeed, the court's remedial order provided only that the union could not displace a worker already on the job in order to appoint a steward.

In his dissent, Judge McMillian disputed the majority's conclusion that the union had failed adequately to justify its conduct, and he would have found the union's conduct lawful. He observed several factors overlooked by the court majority. First, he noted that the appointment-of-stewards clause was the functional equivalent of a superseniority clause limited to layoff and recall in a plant. He also observed the sporadic nature of employment in the construction industry which tended to make employees more dependent on employer goodwill in order to assure continued employment and thus, perhaps, less willing to invite hostility by vigorously enforcing the contract. He therefore concluded that these factors provided justification for the union's conduct. He further concluded, as had the Board, that the evidence did not establish that the union was at all improperly motivated in seeking to appoint its steward at the job site.

I think the conflict at both the Board and court levels shows how close the policy decision in this case was. The case is currently before the Board on remand, and so I cannot comment on the steps to be taken by the Board in evaluating cases of this nature in the future. The court's opinions provide some guidance for the Board in evaluating future cases which present this issue.

Super-seniority

Another area in which you have embraced union "rights" to the detriment of employee rights is in the area of super-seniority. As you well know, a super-seniority clause is one that, for certain purposes, treats the shop steward as the most senior employee, regardless of the length of his or her employment. The Board has long recognized that "properly restricted" (i.e., restricted to layoff and recall), such clauses further the effective administration of bargaining agreements on the plant level by encouraging the continued presence of the steward of the job." Dairylea Cooperative, Inc., 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (C.A. 2, 1976). However, to most observers, the potential for abuse in the application of superseniority is obvious. As your colleagues Members Jenkins and Penello have observed:

> "Superseniority provisions which benefit union officials, be they stewards, officers, or others, are by their very nature coercive because they discriminatorily encourage and reward union participation contrary to the Section 7 right to refrain from such activity."

In contrast to this realistic view, you appear to view such provisions through rose-colored glasses. For example, in your partial concurrence in A.P.A. Transport Corp., 239 NLRB No. 165, you state that you would go beyond the majority and find presumptively lawful any superseniority provisions for any stewards or union officers "so long as the provisions...fall within a range of reason and good faith."

Can you inform us how you can justify endorsing superseniority

provisions, such as the "for all purposes" and "job preference" aspects found unlawful by the A.P.A. majority, which go far beyond any justifiable purpose of aiding the union in its administration of the contract, and, in essence, create a class of "super-employees," insulated from layoff, and granted privileges and benefits not available to the rank-and-file?

As my opinion in A.P.A. Transport makes clear, I would not approve a superseniority provision which went far beyond any justifiable purpose of aiding the union in its administration of the contract. The position I have taken with respect to superseniority clauses is that it is overly harsh to apply a presumption of invalidity to clauses of this nature, particularly when one considers that such clauses are a common feature in collective bargaining agreements and until quite recently were not even questioned. Instead, I would apply a presumption of lawfulness to such provisions as long as they fall within a range of reason and good faith. This presumption is rebuttable upon proof that the clauses have been applied in an unlawful manner or for an unlawful purpose.

In my remarks before the Southwestern Legal Foundation last year, which are a part of the record of this hearing, I observed that the Supreme Court as early as 1949 recognized that superseniority was a common practice justified by the need to assure continuity in office for stewards and union chairman. By 1975, the year in which the Board first announced its ''presumptively unlawful'' standard and first declared a superseniority clause unlawful, 43% of all major collective bargaining agreements contained a superseniority clause, and nearly a quarter of those clauses applied superseniority to matters other than layoff and recall. I believe this figure represents acknowledgement by parties to collective bargaining agreements that enforcement of the contract is enhanced when officials charged with the duty of enforcing the contract are assured of their continued presence on the job.

A.P.A. itself is an example of the paradox created by the presumption of unlawfulness. In that case, the clause on its face granted superseniority ''for all purposes including layoff, rehire, bidding, and job preference.'' In fact, however, the record showed that the clause had been applied in only three situations: layoff, recall, and bidding on routes which would allow the steward to be near the plant in order to be available to process grievances. The Regional Director had refused to issue a complaint on a charge alleging unlawful application of the clause. The sole issue was whether this admittedly lawfully-applied clause was unlawful on its face--that is, whether the union, by agreeing to the clause, caused or attempted to cause the employer to discriminate in order to encourage or discourage union membership. You will recall that the union was absolved of charges that it had attempted to apply the clause in an unlawful manner. In effect, the union was penalized because the parties to the negotiations were unable to anticipate and spell out in precise detail the situations where it might be necessary to depart from the strict application of seniority in order to further the enforcement of the contract.

Mind you, the union was not entirely alone in this pickle. Although no charges were filed under 8(a)--perhaps because there was no unlawful application of the clause--A.P.A. plainly left open the possibility that an an employer who in good faith entered into a superseniority clause and applied it could find itself defending every departure from seniority in an 8(a)(3) proceeding. This leaves something like 10 percent of employers in the survey I mentioned in my A.P.A. opinion open to such repetitive litigation. Indeed, in Connecticut Limousine Service, Inc., 235 NLRB 1350 (1978), the employer was found to have unlawfully agreed to a superseniority clause which concededly was never applied in an unlawful manner.

At the same time, the A.P.A. rule protects no interest that could not be protected as well by applying a presumption of validity to reasonable clauses bottomed in good faith. An employee who felt aggrieved by the application of such a clause could still file a charge. The sole difference would be that the Board, instead of presuming that the parties acted unlawfully when they bargained, would look to the actual application of the clause. Such an approach would recognize the need for flexibility in applying superseniority to varying working conditions.

Finally, I would note that the privileges and benefits of superseniority are available to the rank-and-file. Union office is open to all members, and many contracts provide for superseniority for employees other than officers--for example, for employees with particularly valuable skills.

As telling as your willingness to create these "super-employees" is your toal unwillingness even to question whether the "officers" the union wants to benefit from a superseniority provision have anything at all to do with the administration of the contract--the only justification for such clauses in the first place. In The American Can Company, 244 NLRB No. 78, the majority properly found unlawful the application of a super-seniority provision to union hall guards (or bouncers) and trustees because it was clear that these union officers had nothing to do with contract administration. You and Chiarman Fanning took the extreme position in your dissent that the fact that the evidence indicated that the guards and trustees had "no visible or direct impact on contract administration" would not lead you to "second-guess a union's decision as to which officers aid the union in effectively representing the unit."

In these cases, you are willing to presume the lawfulness of union conduct alleged to have coerced or restrained employees in the exercise of their protected rights and to have caused employe-s to discriminate against their employees. Can you give us any examples of alleged employer restraint, coercion, or discrimination with regard to which, in the absence of a showing of lawful motivation, you would be unwilling to "second-guess" the employer's reasons for its alleged misconduct?

Yes. In American Can itself, one of my objections to the holding was that the majority forced the employer to make a separate conclusion concerning the lawfulness of according superseniority to each official purposed by the union. An employer who guessed wrong, in reliance on the contractual language, could well be liable to employees found to have been discriminated against. As pointed out in my dissent in that case, this puts employers in a very uncomfortable position. I would note, as I did in my recent talk before the Southwest Legal Foundation, that the determination as to which officials do or do not play a role in the administration of the contract may involve considerable probing into internal union affairs. Incidentally, I would note that Members Jenkins and Penello indicated in their dissents in Limpco Manufacturing, 230 NLRB 406, enfd. 582 F.2d 810 (3rd Cir 1978), that it was questionable whether one could draw the line between those officers who did, and those who did not, have the requisite contractual enforcement duties. The majority holding in Limpco, signed by Chairman Fanning and Members Murphy and Walther, which held that officers who play a role in contract administration may be accorded superseniority, was enforced by the Third Circuit.

Another area where I have expressed a reluctance to second-guess an employer's decisions is in the Precision Castings area. In my dissent in Gould Corporation, 237 NLRB 881 (1978), I declined to second-guess an employer's decision concerning which participants in a wildcat strike should be disciplined and to what extent. The majority in that case, consisting of Chairman

Fanning and Members Jenkins and Murphy, held that the employer acted unlawfully in discharging a union steward who engaged in a work stoppage. As Member Penello and I noted in our separate dissents, there was evidence that the steward in question took somewhat of a leadership role in the work stoppage. Nevertheless, because the majority concluded that the steward had been singled out for discharge because of his union office, they concluded that the discharge violated Section 8(a)(3). They additionally found that the discharge was partially motivated by the steward's activities in filing charges with governmental agencies, including the Board, and therefore concluded that the discharge also violated Section 8(a)(4).

Although I agree with the majority's findings concerning Section 8(a)(4), I dissented on the 8(a)(3) finding. I criticized the majority for allowing an employee's position in the union to insulate him from otherwise legitimate discipline. I rejected any suggestion that an employer must include employees who are not union officers among those discharged in order to avoid a finding of unlawful motivation in disciplining wildcat strikers.

I have adhered to this position in later cases, and my position with respect to the Precision Castings issue has been upheld by the 7th Circuit in Indiana and Michigan Electric Co. v. N.L.R.B., 599 F.2d 227 (7th Cir. 1979), cert. denied 103 LRRM 2143, and by the Third Circuit in Gould Inc. v. N.L.R.B., 612 F.2d 728 (3rd Cir. 1980).

Although your position is not (yet) a majority position, how would you explain to an employee who was laid off so that a less senior union hall bouncer could be retained that you have in any way protected his interests?

As a preface to my remarks in response to this question, I would note that every Board Member finds lawful the application of superseniority to some union positions, at least for layoff and recall, and this position has been accepted by the courts. The disagreement within the Board concerns which particular officers in each case should be afforded superseniority, with the American Can majority more willing than I to delve into the union's internal affairs to answer this question. The reasoning behind allowing superseniority, as set forth in the 1949 Supreme Court decision to which I alluded earlier, is that union officials derive authority and skill through continuity in service. The majority opinion in Limpco referred to the Court's reasoning, and added its own comment that the court tacitly endorsed the concept that superseniority could be accorded to individuals whose official responsibilities bore ''a direct relationship to the effective and efficient representation of unit employees.'' Finally, in our dissent in American Can, Chairman Fanning and I observed that the grant of superseniority benefitted the parties to the contract and the employees by encouraging quality representation. We observed that the contract in question set a reasonable number of individuals who could receive superseniority, and left it to the union to determine which officials contributed to the administration of the contract sufficiently to warrant a grant of superseniority. In our view, such an arrangement, agreed to by the parties, was best left to the parties to administer according to their own understanding of the contract.

To date, I have not been faced with a contract which gave the union wholesale authority to give superseniority to minor officers. In American Can, as I have noted, the union could give it to a limited number of individuals. If your question relates specifically to the guard in American Can, my answer is that the parties' contract provided superseniority for an apparently lawful purpose, and the union's judgment was that the guard occupied a position in which it was desirable to assure continuity. It is difficult to answer a hypothetical, if that is what you are posing, because in each case I would have to examine the superseniority clause to determine whether it meets the test of reasonableness and good faith.

The bottom line, if you will, is that in any area concerning contract enforcement, including Dairylea cases, the Board must balance the interests of individual employees with the objective of encouraging enforcement of collective bargaining agreements. In this particular area, I am unwilling to inject the Board into the parties' agreement so long as there is no evidence that the parties acted unreasonably or in bad faith in agreeing to this method of furthering contract enforcement.

DECISIONS WHICH UNDERMINE THE PURPOSE OF THE NLRA TO ENCOURAGE VOLUNTARY SETTLEMENT OF LABOR DISPUTES AND DECREASE THE WORK OF THE BOARD AND THE COURTS

Because of your growing workload, it would seem that you would want to encourage the parties involved in labor disputes to resolve these disputes voluntarily and not burden the Board if it is not necessary. Encouraging the parties to resolve their disputes by arbitration would also seem to be an important goal. I have noticed, however, that a number of decisions in which you have participated have disregarded the settlements which the parties reached or have made it more difficult for the Board to defer to arbitrators' decisions dealing with the same factual situation.

As I clearly stated in Kansas City Star,[1] I am a strong supporter of arbitration as a desirable means to resolve disputes. As a corollary, I also support the Board's deferral to arbitration awards under the Spielberg doctrine.[2] Deferral is not appropriate, and traditionally has not been found appropriate, however, when an arbitration award or a settlement agreement prior to binding arbitration conflicts with an employee's statutory rights under the National Labor Relations Act, or where the arbitration award only resolves a private contractual issue, and does not, in any way, address the statutory issue. In deciding each case on its merits, I have attempted to balance the important policy of encouraging peaceful settlement of labor disputes with the equally important need to assure vindication of an employee's statutory rights. Important employee rights, for example, to organize or to protest dangerous working conditions, must not be lost merely for the sake of efficient contract administration.

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[1] 236 NLRB 866 (1978).
[2] 112 NLRB 1080 (1955).

Frustrating the Parties' Voluntary Settlements

In Roadway Express, 246 NLRB No. 28, you concurred in a decision by Members Murphy and Jenkins holding that a voluntarily negotiated settlement of a grievance is not a bar to subsequent unfair labor practice charges involving the same conduct.

1. Why should an employee, who has assented to a lawful settlement of his grievance, and accepted the benefits of that settlement, be permitted to decide at some later date that he might be able to get a better deal at the Board and to seek an additional remedy in that forum?

In Roadway Express, Inc.,[3] I concurred with Members Murphy and Jenkins that an individual employee's right to file an unfair labor practice charge with the Board was not extinguished by a settlement by the Union and Company of the employee's grievance prior to arbitration. The employee was permitted to proceed with his unfair labor practice charge before the Board because the facts were such that the employee could not be found to have waived any of his statutory rights. The employee was not present when the Company and Union negotiated the settlement, and he did not understand until after the fact that he would not receive any wages for the time between his initial discharge and the settlement.

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[3] 246 NLRB No. 28 (1979)

Of course, the employee did not receive any greater benefits by going to the Board after the grievance was settled. He only received his lost wages. And the Company was not prejudiced, since by reinstating him prior to the Board proceeding, it tolled any backpay obligation.

2. How can your decision have anything but a negative influence on parties who might consider attempting to resolve their disputes on a voluntary, non-litigious basis?

Roadway Express and Coca-Cola Bottling Co.,[1] discussed in my concurrence in Roadway Express, represent an expansion - not a contraction - of the Board's general policy of deferral to arbitration awards. For, until these decisions, the Board had not generally deferred to settlements of a grievance which occurred at a step prior to final binding arbitration. Roadway Express and Coca-Cola strongly encourage voluntary settlement because they make it clear to all of the parties what kind of settlement is necessary in order to obtain deferral. The grieving employee only has to agree in black and white to waive his right to file a charge with the Board. This requirement is not burdensome on the parties, yet it assures that an employee does not unknowingly give up his statutory rights.

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[1] 243 NLRB No. 89 (1979).

3. Is it not implicit in your decision that unless the grievant specifically waives his right to file charges with the Board, any settlement agreed upon had better conform to what the Board would award in the way of remedy if the conduct being grieved were later found by the Board to be an unfair labor practice?

__Roadway Express__ makes no statement either explicit or implicit that a full Board remedy is necessary in order to obtain deferral in the absence of an employees waiver. The point of __Roadway__ and similar cases is to expand the grounds for deferral to prearbitration settlements, while safeguarding the statutory and fundamental due process rights of employees.

Rejected Parties' Voluntary Settlement of Unfair Labor Practice Charges

One of stated purposes of the National Labor Relations Act, set forth in Section 1, is "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." Obviously, one of the most effective and desirable means of achieving this goal is the voluntary settlement by the parties of unfair labor practice charges that otherwise would have to proceed through the extremely lengthy adversary process of trial before an administrative law judge, appeal to the Board, and subsequent appeal to the Court of Appeals. Assuming neither party is coerced in such settlements, those agreements not only spare the sorely burdened resources of the Board and the courts, they more importantly give the parties the satisfaction of themselves reaching a mutually agreeable resolution of their disputes. Such voluntary resolution is particularly encouraging because it signifies a degree of cooperation and mutuality totally foreign to the adversary proceeding.

In this light, Clear Haven Nursing Home, 236 NLRB 853, stands as one of the most distressing decisions of your tenure. In that case, you (and Chairman Fanning and Member Jenkins) refused to accept the parties' voluntary resolution of unfair labor practice charges arising out of a collective bargaining breakdown and subsequent strike. In spite of the evidence, cited by the dissenters, showing that the employees overwhelmingly ratified the proposed settlement after a full discussion of its "pros and cons", you and your colleagues were willing to gamble what the employees had gained in that settlement on the possibility that the General Counsel, if it proved its case, could gain them more (i.e. full back pay).

How can you justify a decision which says to the parties, and most particularly to the employees, "we know better than you what an acceptable settlement should be?"

How would you distinguish your paternalism in this regard from an order requiring parties to collective bargaining to include in their agreement a particular term the Board views as appropriate?

About 7 months after your initial decision in Clear Haven Nursing Home, you and your colleagues, at 239 NLRB No. 179, denied "for untimeliness" the parties' joint motion that the Board reconsider its decision, and, in view of that disposition, you also denied the motion of the Chamber of Commerce to come into the case as an amicus curiae.

However, was it not true that the parties in their joint motion made it clear that the actions they had taken pursuant to the settlement agreement had led to "harmonious labor relations" and that they asked for the opportunity to allay your concerns regarding the settlement you rejected?

As the dissenters also pointed out, the back pay issue was considered by the parties in determining the wage rates included in their settlement.

You have asked several questions about the Board's decision in Clear Haven Nursing Home, 236 NLRB 853. I will answer each of your specific questions but I think it important first to comment on the settled legal principles that the Board must apply in deciding whether or not to approve a settlement agreement. Only by an understanding of those principles can the Board's Clear Haven decision be properly evaluated.

At the outset, it must be observed that the Board and the General Counsel have consistently emphasized the need for and desirability of a strong and effective settlement program. Thus, the current settlement rate is the highest in the Agency's history, and has been steadily increasing in recent years. In this connection, it must be emphasized that the Board functions in behalf of the public interest in the vindication of statutory rights, and not merely in the interest of the private parties to a dispute. Thus, before it approves a settlement, the Board must satisfy itself that the alleged unfair labor practices put in issue by the underlying complaint will be adequately remedied and that the settlement, considered in its entirety, will effectuate the policies and purposes of the Act.

Viewed with these considerations in mind, the settlement proffered in Clear Haven was plainly defective. Thus, although the Board consistently has required, with court approval, the posting of a notice as an essential element of the effective remedy that Congress has charged us with fashioning, the settlement offered in Clear Haven failed to inform employees of the rights of unfair labor practice strikers and failed to communicate to employees their right to engage in, or to refrain from engaging in, protected concerted activity free of employer conduct that would interfere with, restrain, or coerce them in the exercise of such rights.[1] Of equal moment, the settlement did not contain any recognition by the Employer of its obligation to provide its employees' bargaining agent with information relevant to the agent's performance of its collective bargaining duties. This omission occurred despite the fact, noted by the majority,[2] that the record demonstrated the Employer's successful resistance to Union efforts to acquire information which the Union averred was necessary for intelligent bargaining.[3]

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[1] In this connection it is important to remember that the complaint alleged that the Employer violated both its collective bargaining obligations under the Act and its statutory obligation to respect employees' exercise of their protected rights. Hence the need for an effective notice in this case was no hollow exercise in formalism.

[2] Clear Haven, supra, note 6.

[3] The right of a union to obtain relevant bargaining information has been recognized by the Supreme Court, N.L.R.B v. Acme Indus. Co., 385 U.S. 432 (1967), and is now so well settled as to be beyond serious dispute.

Perhaps the single most serious shortcoming of the Clear Haven settlement was the absence of an adequate make-whole remedy occasioned by the omission of any provision for employees' lost backpay. Again, the Board traditionally has considered the making whole of employees in instances where they have lost backpay to be a critical element in determining whether to approve a settlement. And for good reason. After all, how could it be seriously contended that the Board had fulfilled its statutory and public obligations to deter the commission of unfair labor practices and to spur the peaceful resolution of labor disputes by collective bargaining if the Board approved what are, in effect, ''bargain basement'' settlements?

In sum, a fair reading of Clear Haven, coupled with an examination of the Board's traditional approach to the approval of settlements, demonstrates that the Clear Haven decision is nothing more or less than a reaffirmation of prior Board decisions holding that private voluntary resolutions of industrial disputes are not to be sanctioned by the agency charged by Congress with exclusive power to prevent unfair labor practices when such agreements are inimical to the public interests that are necessarily involved.[4]

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[4] See, generally, Robinson Freight Lines, 117 NLRB 1483 (1957). See also, The Ingalls Steel Construction Co., 126 NLRB 584 (1960); Nickles' Pay-less Stores, 163 NLRB 817 (1967).

Turning now to the specific questions you have asked about Clear Haven, I am satisfied that this decision tells both unions and employers that the Board will not sanction an agreement that undercuts the public interest in the effectuation of statutory rights and requires individual employees to forego their rights in exchange for a ''bargain basement'' settlement. In this latter connection, I think it is important to remember that the employees involved in Clear Haven had been embroiled in a long, bitter, and ultimately unsuccessful strike, allegedly caused and prolonged by the employer's unlawful conduct. As the majority noted in Clear Haven, despite the pressures to accede to any settlement under these circumstances, it is remarkable that a sizeable number of employees voiced their opposition to the settlement offered them.

You have also asked how the Board's Clear Haven decision can be distinguished from an attempt to require parties engaged in collective bargaining to include a particular term in their contract. There is an overriding public interest in the vindication of statutory rights and the Board, if it is to fulfill its role as a public agency, must consider not just the particular situation before it, but also the overall impact a proposed settlement will have on the free exercise of statutory rights nationwide. Indeed, your question itself makes a critical point in favor of the majority decision in Clear Haven. Thus, as you are aware, under the Statute as interpreted by the courts, the Board cannot impose agreement to any term or condition upon the parties to a collective bargaining contract. That is so because the collective bargaining contract is largely a private matter between the parties. In Clear Haven, however, the majority in refusing to approve the proffered settlement which the General Counsel had previously rejected, repeatedly underlined the public interests that that were at stake by noting that Board approval of a defective settlement would serve neither ''as a deterrent to commission of unlawful conduct or as a spur to the speedy and peaceful resolution of labor disputes by collective bargaining.'' Indeed, as the majority also pointed out, rubber stamping ''bargain basement'' settlements ultimately would undermine the entire settlement process at the prehearing stage by encouraging respondents to wait and proffer deficient settlement agreements at the hearing in the hope of winning approval there of settlements already rejected by the General Counsel. In sum then, the Board's decision in Clear Haven was no exercise in ''paternalism,'' but rather the Board's effort to meet its public obligation to insure fair and just settlements.

Finally, you inquire concerning the Board's rejection of the parties' motion for reconsideration in Clear Haven, reported at 239 NLRB 1244. As indicated there, the motion was rejected ''for untimeliness under the Board's Rules and for lack of merit'' (emphasis added). All parties concede, as you apparently recognize, that the motion was untimely under the Rules and Regulations and could be rejected for that reason alone. Moreover, as the majority carefully pointed out, the moving parties failed to request an extension of time for filing and failed to allege any extraordinary circumstances to justify the untimely filing of the motion. Finally, the majority pointed out that the motion on its merits raised nothing not fully considered and discussed by the Board in its original Order. In short, the motion was procedurally and substantively infirm.

If I may, I would like to make a final observation on Clear Haven and the controversy it engendered. In my view, the best way to evaluate that decision is to see what happened after it issued. First of all, the Board's decision did not result in the rupture of the collective-bargaining relationship between the parties, in extensive further litigation, or in any other deleterious consequences. In fact, the parties subsequently entered into a settlement that was approved by the General Counsel and included agreement on a new contract and a provision for payment of over $30,000 in backpay to employees. Just as

important, Clear Haven did not signal a new Board policy in favor of litigating for litigation's sake, but rather stands as a reaffirmation by the Board of its obligation to safeguard the public interest by sanctioning only those settlements that fully and fairly resolve the underlying complaint. Indeed, the ultimate result reached in Clear Haven and the fact that in the last year the Board's settlement rate has been the highest in its history, bear eloquent witness to the Board's success in this delicate and difficult area.

Weakening The Spielberg Deferral Doctrine

Background

Under the Spielberg Doctrine the Board will withhold its authority to adjudicate alleged unfair labor practices and defer to the decision of an arbitrator selected by the parties to resolve their dispute so long as: (1) the proceedings are fair and regular; (2) the parties have agreed to be bound; and (3) the arbitrator's decision is not clearly repugnant to the policies and purposes of the Act.

Questions

In your concurrence in The Kansas City Star Company, 236 NLRB 866, you expressed the admirable view that in deciding whether to defer to an arbitrator's award under Spielberg, the Board should not:

(1) Refuse to defer to an arbitrator's award simply because "the record evidence is susceptible of other inferences" than those drawn by the arbitrator; or (2) engage in a *de novo* review of the evidence and substitute its judgment for that of the arbitrator. You also expressed the view that the Board should not overturn an arbitrator's findings where the arbitrator has ruled "on every factual and legal question necessary to the resolution" of a legal issue, even if he made no specific ruling on that issue.

However, in Suburban Motor Freight, 247 NLRB No. 2, a case in which the three Spielberg criteria were met, you joined Chairman Fanning and Member Jenkins in reversing earlier precedent (Electronic Reproduction) holding that the Board "will no longer honor the results of an arbitration proceeding under

Spielberg unless the unfair labor practice issue ... was both presented to and considered by the arbitrator."

(1) Doesn't *Suburban Motor Freight* do exactly what you said in *Kansas City Star* you wanted to avoid -- doesn't it transform the arbitrator from "the parties' chosen decision maker: into something "more akin to a hearing officer" whose decision and recommendation the Board essentially reviews *de novo*?

Suburban Motor Freight does not alter the burden of proof in an arbitration proceeding, nor does it require a party to raise with the arbitrator the question of whether its own conduct is an unfair labor practice. In fact, the Board will defer even though there is no mention of the unfair labor practice at the arbitration hearing. Thus, in *Atlantic Steel*,[1] Members Murphy, Penello and I deferred to an award upholding an employee's discharge for insubordination where, although the unfair labor practice was never specifically mentioned, the employee had presented to the arbitrator his claim that he was not insubordinate, but was merely processing a grievance. Again, in *Bay Shipbuilding* [2] I joined Member Penello in deferring to an arbitrator's decision that an employer had lawfully changed insurance carriers where the arbitrator considered the same evidence that the Board would have considered in determining whether the change of carriers was an unlawful refusal to bargain under Section 8(a)(5) of the Act.

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[1] 245 NLRB No. 107 (1979).
[2] 251 NLRB No. 114 (1980).

(2) Won't Surburban Motor Freight proliferate litigation of the same sets of facts by encouraging grievants to withhold evidence and issues concerning possible unfair labor practices from the arbitrator, and then, if the arbitrator's award is not "satisfactory", filing charges with the Board?

Suburban Motor Freight does not encourage employees or their representatives to withhold evidence in arbitration proceedings. Rather, Suburban Motor Freight recognizes that arbitrations are often informal proceedings without the same safeguards and skills of advocacy found in a Board proceeding, and that, for that reason, an employee should not be foreclosed from using the Board's processes simply because he has participated at some point in an arbitration proceeding.

(3) Under your decision, if the party accused of violating the contract wants the Board to defer to the arbitrator's award, that party apparently must raise with the arbitrator the possibility that its own conduct might be viewed as an unfair labor practice. Realistically, won't this subvert the arbitral process by introducing undesirable tactical considerations which go far beyond reaching resolution of the dispute?

Suburban Motor Freight does not alter the burden of proof in an arbitration proceeding, nor does it require a party to raise with the arbitrator the question of whether its own conduct is an unfair labor practice. In fact, the Board will defer even though there is no mention of the unfair labor practice at the arbitration hearing. Thus, in Atlantic Steel,[1] Members Murphy, Penello and I deferred to an award upholding an employee's discharge for insubordination where, although the unfair labor practice was never specifically mentioned, the employee had presented to the arbitrator his claim that he was not insubordinate, but was merely processing a grievance. Again, in Bay Shipbuilding [2] I joined Member Penello in deferring to an arbitrator's decision that an employer had lawfully changed insurance carriers where the arbitrator considered the same evidence that the Board would have considered in determining whether the change of carriers was an unlawful refusal to bargain under Section 8(a)(5) of the Act.

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[1] 245 NLRB No. 107 (1979).
[2] 251 NLRB No. 114 (1980).

Similarly, in *Brown Company*, 243 NLRB No. 180, you and your colleagues (Fanning and Jenkins) rejected a unanimous decision of a joint labor-management grievance committee. Although there was no evidence that the committee acted other than impartially, you held that some of its union and management members had "conflicting interests" which might have tainted their decision. Furthermore, in spite of the Union's acquiescence in the grievance committee's decision that the Company had not violated the contract by transferring certain work, you found that such acquiescence did *not* amount to consent to the company's conduct, and, therefore, that the company violated Section 8(a)(5).

1. In *Brown*, didn't you and your colleagues, in the guise of making a legal judgment, simply draw different inferences than those drawn by parties' chosen decision-maker?

In Brown Company,[1] the Board did not defer to a joint labor-management committee (consisting of an equal number of representatives from each side) because of the clear conflict of interest of some members of the panel. For example, one of the union representatives was from a local whose members had been transferred into jobs formerly held by the grievants.

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[1] 243 NLRB No. 100 (1979).

2. And in attacking the impartiality of the Joint Committee, in the absence of evidence that the Committee in fact acted improperly, haven't you and your colleagues thrown into doubt the "deferability" of the decisions of such committees across the country?

Brown did not create doubt as to whether deferral to a joint committee was appropriate, because that decision cearly stated that, as a general rule, deferral to such a panel is appropriate, if other Spielberg criteria are met.

Furthermore, in a later decision - Chemical Leaman Tank Lines,[1] Member Penello and I reiterated our support for this general rule by deferring to a joint committee award. Thus, the law in this area has not changed during my tenure on the Board.

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[1] 251 NLRB No. 146 (1980).

In Ad Art, Incorporated, 238 NLRB No. 159, you and Chairman Fanning also rejected the decision of an arbitrator who had ruled on the "factual and legal questions necessary to the resolution of" the unfair labor practice issue by finding that the grievant had not been fired for filing grievances. Instead you adopted the decision of an administrative law judge who substituted his inferences for those of an arbitrator, and found that the employee's discharge was unlawful.

Similarly, based largely on a series of inferences as to the meaning of language in an employee's leaflet, you and Members Jenkins and Murphy rejected an arbitrator's finding that an employee had been justifiably discharged for abusing work time and distributing a handbill which denigrated and disparaged her employer. Pincus Brothers, Inc., 237 NLRB 1063.

Mr. Truesdale, in view of your frequent rejection of arbitrators' awards, which under your Kansas City Star rationale, would have been appropriate for deferrral, what, if anything, is left of the set of principles you announced in Kansas City Star?

In Kansas City Star, I announced - along with Members Murphy and Penello - my firm support of the Board's Spielberg doctrine of deferral to arbitration awards. Member Penello stated that ''his position on Spielberg does not significally differ from that taken today by Member Truesdale,'' and that ''both management and labor generally have accepted Spielberg and should welcome its revitalization.''

Since then I have continued to support the principles of Spielberg, while at the same time being careful to insure that deferral does not result in denial of an employee's statutory rights. There have, understandably, been a number of cases where I found deferral to be appropriate, as well as cases where I have decided not to defer. Each case has been decided on its own merits.

Pincus Brothers [1] and Ad Art, Inc.,[2] which you discuss, are not inconsistent with Kansas City Star. In Pincus Brothers, I joined Members Murphy and Jenkins in holding that an arbitrator's award was repugnant to the Act. The arbitrator had upheld the discharge of an employee for distributing a leaflet which was critical of the Company. The Board found that the employee, in distributing the leaflet, was exercising his rights under Section 7 of the Act, and that the arbitrator's award interfered with, and ignored, the employee's statutory rights. Of course, in Kansas City Star, I stated that I would not defer where an arbitrator's award was not consistent with Board law.

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[1] 241 NLRB No. 129 (1979), enforcement denied 620 F.2d 367 (3rd Cir. 1980).

[2] 238 NLRB No. 159 (1978).

The Third Circuit recently disagreed with the Board on this case, and denied enforcement. The court, in a split decision, with three separate opinions, expounded an entirely new standard for deferral: whether the arbitration award is arguably consistent with Board policy. While I do not believe it is proper for me to comment in this forum on the specifics of this long and divided decision, the decision does present some new ideas for the deferral area.

In Ad Art, Inc., deferral was inappropriate because the arbitrator found that the employee's exercise of his clear statutory right to file grievances was a major cause of the Employer's decision to discharge the employee. In Ad Art I applied Kansas City Star and found, based on the arbitrator's own findings, that the employee was unlawfully terminated.

The above cases must be considered with other decisions where I joined a Board majority in deferring to arbitration awards. Atlantic Steel, Bay Shipbuilding, and Chemical Leaman have all been mentioned previously. In addition, I have voted to defer to an arbitrator's award in B & K Investments,[3] American Bakeries Co., Inc.,[4] and United Postal Service.[5]

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[3] 248 NLRB No. 167 (1980).
[4] 249 NLRB No. 170 (1980).
[5] 241 NLRB No. 192 (1979).

B & K Investment - Member Penello and I deferred to an arbitrator's award which resolved the difficult question of the bargaining obligation of an employer who had purchased an on-going operation.

American Bakeries - Again, Member Penello and I deferred to an arbitrator's award where the parties had an unusual contract under which an employee who is disciplined or discharged is permitted to remain on the job pending an expedited arbitration procedure.

United Postal Service - Members Penello, Murphy and I once again deferred to an arbitrator's decision that the employee did not have a right under Weingarten to a representative at a meeting with management. Moreover, unlike Chairman Fanning and Member Jenkins who dissented, we did not think the award was defective by virtue of the arbitrator's use of a ''clear, concise and direct'' standard of proof.

In sum, I have, throughout my term as Board Member, remained a staunch supporter of Spielberg and of arbitration as an efficient, voluntary mechanism for the peaceful resolution of labor disputes. I have not, however, favored arbitration at the expense of employee rights.

Finally, I would note that, if the Spielberg criteria for deferral are to mean anything, there will be some cases in which deferral will simply be inappropriate. The fact that the Board does not defer on some occasions does not mean that Spielberg has been jettisoned. A review of the decisions in my tenure will reveal that the Spielberg doctrine is still good law and that it has been applied consistently throughout my decisions.

Mr. Truesdale --

Have you had any personal correspondence with any union official during your term as a Board member?

Could you supply the Committee with copies of all of that correspondence for the Record?

I have a letter in front of me which you wrote to Glenn E. Watts, President of the Communications Workers of America, praising him for making a political speech in behalf of President Carter on or about March 26, 1979.

Do you recall that letter? What was your motivation in writing such a politically-oriented letter to the President of a large International Union which brings cases before the Board for resolution?

What part of the Watts speech do you particularly agree with -- in your words constituting -- a "refreshing and welcome note"?

NATIONAL LABOR RELATIONS BOARD
Washington, D.C. 20570

March 27, 1979

Glenn E. Watts, President
Communications Workers of
America, AFL-CIO
1925 K Street, N. W.
Washington, D. C.

Dear Glenn:

I read in the BNA Daily Labor Report of your remarks concerning President Carter's leadership during his first two years in office. Congratulations on striking this refreshing and welcome note so sorely needed in these fractious times! If your speech is in a form available to the public, I would appreciate having a copy.

With all best wishes,

Sincerely,

John Truesdale

John C. Truesdale
Board Member

April 3, 1979

File: 3.5
x 3.

Mr. John Truesdale
Board Member
National Labor Relations Board
Washington, D. C. 20570

Dear John:

Good of you to notice my careful words of praise for what the President is making a very earnest attempt to do. Sometimes, I feel like I'm crying in the wilderness — especially in Washington, D. C. When I go out to meet with the members in local and regional gatherings, I find a much greater understanding of what the Administration is up against. I might also point out, that's where the votes are!

Cordially,

Glenn E. Watts
President

Enc.

--Periodic review by the agency of any rule estimated to cost $100 million or more, as well as smaller rules which may be outmoded. Criteria to be used in the review include the benefits being provided by the rule, adverse economic effects, and any technological, economic, social or other changes that have taken place since the rule was adopted;

--Assignment of responsibilities for regulatory planning and management by the head of an agency to a particular office of the agency. This requirement is intended to fix responsibilities in the agency.

Besides the requirements on regulatory analysis and management, the proposed legislation makes changes in the Administrative Procedure Act aimed at reducing delays, increasing public participation in rulemakings, and improving the quality of administrative law judges.

The section dealing with informal rulemaking procedures is revised to make the law easier to understand and incorporate requirements established by the courts, according to a White House commentary on the bill. The proposal also concludes that trial-type hearings are inappropriate for some licensing, formal rulemakings, and ratemakings, and introduces expedited procedures for formal hearings.

A number of other changes are proposed concerning the conduct of trial-type proceedings, judicial review of rulemaking, and agencies' subpoena powers. The revisions would give all agencies power to issue subpoenas in formal hearings.

The President said oversight of management reforms contained in the legislation would be placed with the Office of Management and Budget. The Administrative Conference of the U. S. would have oversight over administrative law judges and over a provision that would make funds available to groups to participate in rulemakings which ordinarily couldn't afford to take part.

In a message to Congress describing his reform bill, Carter also said he had a number of nonlegislative initiatives on regulatory reform planned. Included are review of all safety standards of the Occupational Safety and Health Administration, streamlining of Environmental Protection Agency permit procedures, review of banking regulations, a government-wide cancer policy, overhauling regulations imposing costs on hospitals, and other measures.

An executive order is in preparation to reduce the paperwork burden, the President said in the letter to Congress. Simpler forms for reporting and reduced requirements on small businesses are the aim of the presidential order. Centralizing review of federal paperwork requirements in OMB would also be accomplished.

Mr. Carter urged Congress to pass sunset legislation requiring review of agencies' activities and the termination of unnecessary and wasteful programs by cutting off funds. He also promised to submit legislation on drugs, nuclear plant siting, and meat and poultry inspection.

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COMMUNICATIONS WORKERS PRESIDENT PRAISES PRESIDENT CARTER'S ACHIEVEMENTS IN OFFICE

Communications Workers President Glenn E. Watts praises President Carter's leadership during his first two years in office, saying that he has taken "giant steps" toward restoring trust in government and in "recapturing our national economic vitality."

Addressing the opening session of a four-day CWA legislative-political conference in ashington, Watts, who was one of the early supporters of Mr. Carter's campaign for the residency, said that Mr. Carter has managed to overcome a number of problems relating to the economy which he inherited from the previous administration.

Unemployment has fallen by 45 percent, from about 8 percent to 5.7 percent and total employment has risen to an all-time high of 95.9 million workers, Watts observed. "Especially noteworthy," he added, "is the fact that job opportunities for women and minorities have increased substantially." Adult female employment has risen by 11 percent, nonwhite employment by 11.4 percent, and teenage employment by 11 percent, Watts said.

The CWA leader, speaking as Egyptian-Israeli treaty-signing ceremonies were about to get underway at the White House, also noted in his address that the Gross National Product has climbed by 9.25 percent and that Mr. Carter has signed legislation increasing the minimum wage from $2.30 to $3.25 by 1981 and to overhaul the food stamp program to provide additional benefits for some 2.2 million low-income Americans. Other achievements cited by Watts include the signing of legislation expanding financial assistance to college students of middle-income families and the enactment of a $20 billion tax cut bill.

The Carter Administration, Watts said, could have accomplished more in its first 27 months "if the nation had not been besieged by an explosion of single-issue special-interest lobbies which have thwarted many progressive programs and which now, indeed, threaten to polarize American politics." The proliferation of such lobbies, he added, threatens to "tear our national fabric, splinter our unity and turn America into a national of contentious, warring factions, responsive only to narrow goals."

Last December Watts was widely quoted in the press after he told reporters that he hought AFL-CIO President George Meany's repeated, harsh criticism of Mr. Carter's policies was a mistake. Although Watts agrees with Meany and most other labor leaders that mandatory wage and price controls are preferable to the President's voluntary guidelines, he has expressed a willingness to go along with the 7 percent wage figure, provided that some modifications to the program are made with regard to profits and prices and that Congress enacts the Administration's real wage insurance proposal. No major contracts are up for renegotiation by CWA this year.

The AFL-CIO Executive Council, during its recent mid-winter meeting in Bal Harbour, Fla., called the voluntary program unfair and unworkable, while Meany has demanded "full and complete controls on the prive of everything and the income of everybody."

Watts also had some advice for those in Congress who have been influenced by conservative lobbyists who are calling for a constitutional convention to balance the federal budget. Declaring that a constitutional convention threatens to send the nation "on an uncharted course to an unknown destination," the CWA leader suggested three eays in which the Congress could balance the budget without changing the Constitution.

"One way would be to cut about one-third of the federal funds that the Senate and the House appropriate each year to assist state and local governments." Last year, Watts said, "Congress earmarked $82.9 billion for this purpose. If this year Congress were to terminate this assistance, it could produce a federal budget surplus of nearly $54 billion."

Watts said another way to balance the budget would be to "eliminate the $29 billion surplus that state and local governments have accumulated." He pointed out that the Presi- nt's budget for fiscal year 1980 forecasts a $29 billion federal deficit.

A third way to balance the budget, he said, would be to close up the tax loopholes that permit billions of dollars to escape the federal treasury each year, to target these revenues toward balancing the budget, and to begin creating a federal surplus to be used in times of national emergency.

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JUSTICES REFUSE TO CONSIDER TRIAL JUDGE'S POWER TO HALT UNION INSISTENCE ON INTEREST ARBITRATION

The Supreme Court refuses to consider a union's claim that a federal district court did not have jurisdiction to determine whether the union had violated the Taft-Hartley Act by insisting to impasse on the inclusion of an interest arbitration clause in a new contract.

Local 23 of the Milwaukee Newspaper & Graphic Communications Union contended in its petition for review that a holding by the U.S. Court of Appeals for the Seventh Circuit affirming the district court's jurisdiction conflicts with prior Supreme Court decisions regarding NLRB preemption of unfair labor practice cases.

The current contract between Local 23 and Newspapers, Inc. -- which has continued beyond its August 23, 1976 expiration date -- contains an arbitration clause providing that "all questions . . . including disagreements arising in negotiations with respect to a new contract . . ." are to be referred to arbitration. After extensive bargaining, the union and company were unable to reach agreement on a new contract. The unresolved issues included the term of the contract, manning requirements, wages, hours, vacations, health and welfare benefits, discharge and appeal procedures, and whether the existing arbitration clause should be included, modified, or deleted in the new contract.

The union filed its Section 301 action in the U.S. District Court for Eastern Wisconsin, seeking to compel the company to submit all of the unresolved issues to the arbitrator. In the company's brief in support of its motion to dismiss the action, Newspapers, Inc. agreed to submit to arbitration all issues other than the dispute over inclusion, modification, or deletion of an arbitration clause in the new contract. The company asserted that Local 23's insistence that the arbitration clause issue be submitted to arbitration constituted a violation of Section 8(b)(3), and therefore, the contractual promise to arbitrate could not be enforced with respect to that issue. Both the district court and the Seventh Circuit ruled that the union had violated Section 8(b)(3).

In its petition for Supreme Court review, the union submitted that the district court erred under Section 301 by considering and determining that the union had committed an unfair labor practice. "By not limiting its consideration to the terms of the contract and the existence of any breach, the court thwarted the legislative purpose of ensuring parties to a collective bargaining agreement that the contract they negotiated would be honored," Local 23 stated. "Moreover, federal labor policy favors the enforcement of interest arbitration agreements just as it favors the enforcement of grievance arbitration agreements."

The company responded that "there is no issue of preemption in this case." Newspapers, Inc. declared that "it is beyond doubt that when the activity in question is arguably an unfair labor practice prohibited by the National Labor Relations Act, the authority of the National Labor Relations Board is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." It was entirely proper for the district court to take heed of an "unbroken line of decisions holding that it is an unfair labor practice for a union to insist to impasse on having an interest arbitration clause included in a new contract," the employer contended.

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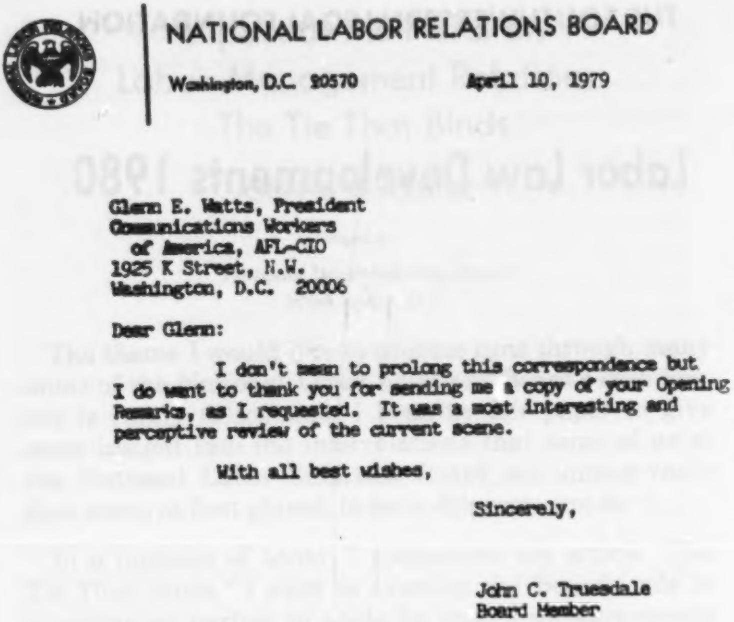
Members of the National Labor Relations Board traditionally have not engaged in political activity during their term of office. I have followed that tradition. I do, of course, have opinions as a private citizen.

In response to your request, a search of my correspondence files does not reveal any other personal correspondence with any union official during my term as a Board member. In addition to the exchange of correspondence attached to your question, however, I do find the attached further letter to Mr. Watts dated April 10, 1979, acknowledging the copy of his Opening Remarks that I had requested. I no longer have this document, but I assume that it tracked the summary attached to your question.

My letter to Mr. Watts stemmed from the fact that I knew him, that I have been a strong supporter of President Carter throughout his first term, and that I welcomed Mr. Watts' public expression of support for the President at a time when few other labor leaders were doing so. The summary of his speech on which I based my letter to him dealt with the Administration's economic policies; it did not discuss or touch on the labor law which the NLRB administers. The parts of his speech which I particularly agreed with were those praising President Carter's leadership.



NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

April 10, 1979

Glenn E. Watts, President
Communications Workers
of America, AFL-CIO
1925 K Street, N.W.
Washington, D.C. 20006

Dear Glenn:

I don't mean to prolong this correspondence but I do want to thank you for sending me a copy of your Opening Remarks, as I requested. It was a most interesting and perceptive review of the current scene.

With all best wishes,

Sincerely,

John C. Truesdale
Board Member

THE SOUTHWESTERN LEGAL FOUNDATION

Labor Law Developments 1980

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Impact of the NLRB on Labor-Management Relations: The Tie That Binds

JOHN C. TRUESDALE*

Member
National Labor Relations Board
Washington, D.C.

The theme I would like to address runs through many areas of the National Labor Relations Board's case law, but is rarely articulated. I hope in this paper to give some insight into the interrelations that some of us at the National Labor Relations Board see among cases that seem, at first glance, to be in disparate areas.

In a moment of levity, I nicknamed my article "The Tie That Binds." I want to examine the Board's role in encouraging parties to abide by their own agreements instead of asking us to rescue them from the consequences of their bargains.

A pivotal case in the area of adherence to contracts is the Board's recent *Dow Chemical*[1] decision, issued September 18, 1979. *Dow Chemical* addressed two issues. The first was whether a strike in violation of a contractual no-strike clause may nevertheless be protected because it was provoked by employer unfair labor practices; I shall refer to this as the *Arlan's*[2] issue. The second question, which I addressed in a separate concurrence, asked, When may an employer respond to a strike in violation of a no-strike clause by rescinding the collective bargaining agreement; I shall refer to this as the *Marathon*[3] issue.

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* The author is pleased to acknowledge the assistance of Luella Nelson, a lawyer on his staff, in the preparation of this paper.

[1] Dow Chemical Co., 244 N.L.R.B. No. 129 (Sept. 18, 1979).

[2] Arlan's Dep't Store of Michigan, Inc., 133 N.L.R.B. 802 (1961).

In *Dow Chemical,* the employer announced that it would institute a shift change. The union grieved when the employer refused to bargain over the change; however, before the grievance procedure could be completed, the employer instituted the change. Without reaching the final step of the grievance procedure, the union struck on the first day of the shift change, notwithstanding a no-strike clause. The employer hired replacements for the strikers, notified the union that it was rescinding the contract, and ultimately discharged the strikers. Later, after a majority of the striker replacements signed a petition stating that they did not want to be represented by the union, the employer withdrew recognition from the union. Charges were filed with the Board alleging that the employer had refused to bargain concerning the shift change, rescinded the contract, discharged the strikers, and withdrawn recognition, all unlawfully.

It would lengthen this discussion unduly to describe the travels of *Dow Chemical* through the Board and the courts. Suffice it to say that *Dow Chemical,* after dismissal by a Board panel majority of all but one refusal-to-bargain allegation,[4] was remanded by the Third Circuit[5] and, by the time I was appointed, found itself back before the Board with instructions from the court to reconsider the Board's policies in this area in light of recent developments in national labor policy.

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[3] Marathon Elec. Mfg. Corp., 106 N.L.R.B. 1171 (1953), *aff'd sub nom.* Local No. 1113, United Electrical, Radio & Machine Workers of America v. NLRB, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied* 350 U.S. 981 (1956).

[4] Dow Chemical Co., 212 N.L.R.B. 333 (1974).

[5] United Steelworkers of America, AFL-CIO-CLC (Dow Chemical Co.) v.

In remanding *Dow Chemical,* the Third Circuit was concerned that *Arlan's Department Store* might not further the cause of industrial peace. *Arlan's* was a 1961 decision of the Board and, you will recall, held that a strike in breach of a no-strike clause was protected only if it was in response to a serious employer unfair labor practice. The court suggested that the distinction between serious and nonserious unfair labor practices was unworkable and, further, that employers should be required to exhaust their legal and contractual remedies before responding to a strike provoked by nonserious unfair labor practices through such self-help measures as contract rescission or discharge of strikers.

A divided Board rejected the court's suggestion that *Arlan's* be overruled. I voted with one Board majority to reject the court's suggestion that *Arlan's* be overruled and with a different majority to find that the unfair labor practice involved in *Dow Chemical* was a serious one.

On the *Arlan's* issue, I agreed with Members Murphy and Penello that the *Arlan's* rule contributed to industrial stability by tending to discourage unions from taking hasty strike action in response to isolated and minor unfair labor practices. In my separate concurrence, I noted that minor violations could be resolved in peaceful forums and that the *Arlan's* rule encouraged this approach by creating a buffer zone in which unions would hesitate before striking. As evidence of the effect of the rule, I pointed to the low incidence since 1962 of cases raising *Arlan's* issues.

I also agreed with Chairman Fanning and Members Jenkins and Murphy that the unfair labor practices engaged in by the employer in *Dow Chemical* were serious unfair labor practices under *Arlan's*. In my separate con-

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NLRB, 530 F.2d 266 (3rd Cir. 1976), *cert. denied sub nom.* Dow Chemical Co. v. United Steelworkers of America, AFL-CIO-CLC, 429 U.S. 834 (1976).

currence, I noted that respondent unilaterally reduced the income of a significant part of the work force and, further, failed to take affirmative steps to obtain binding arbitration of the dispute. I found that these actions "undermined the good faith and trust which are uniquely important to the successful administration of a collective-bargaining agreement." For this reason, I concluded that the strike in response to the employer's serious unfair labor practices was protected.

The standard usually articulated by the Board in determining what is a "serious" unfair labor practice is that the violation must strike at the heart of the collective-bargaining relationship. The Third Circuit criticized the ambiguity in this area, and I must agree that there are times when it is unclear whether a particular unfair labor practice is "serious." At the risk of being flippant, I might suggest that, if you are not sure an unfair labor practice is serious, perhaps you should think twice about striking. I hasten to add that, as noted in both the majority opinion and my concurrence, there may be situations where a series of minor violations may render a strike protected where the employer appears to be trying to "nickel-and-dime" the union to death.

Having addressed the *Arlan's* issue in my concurrence, I departed from the majority and found it necessary to address the other question raised by the Third Circuit, namely, the *Marathon* issue.

The Third Circuit, in remanding *Dow Chemical*, expressed its concern that the *Marathon* rule automatically gave an employer the right to terminate a contract for a strike in breach of the contract, except where the strike was occasioned by a "serious" unfair labor practice. In my *Dow Chemical* concurrence, I agreed that such a result would be inequitable where a nonserious unfair labor practice played a role in the strike. In order to prevent an employer from benefitting from his own wrongdoing, I said that I would modify the *Marathon* rule to forbid the rescission of a contract where the employer has committed *any* unfair labor practice. In my opinion, the *Marathon* rule, as heretofore applied by the Board, has been an overly formalistic application of pure contract principles to conduct which ought to be governed by the policies of the Act favoring stability in labor relations.

I believe that the combination of my *Arlan's* and *Marathon* positions addressed the concerns which led the Third Circuit to remand for reconsideration of the Board's policies. I envision a three-tiered analytical structure. In an instance where the employer has committed no unfair labor practice, a union that strikes in violation of a no-strike clause does so at its peril. The strike is unprotected, and the employer may discipline strikers or rescind the contract or both.

Where the employer is somewhat at fault for the strike, by virtue of having committed a nonserious unfair labor practice, the union still takes some risks in striking, because, as in the first instance, the strike will be unprotected and strikers may be disciplined. In recognition of the employer's role in provoking the strike, however, the employer may not rescind the contract.

Finally, of course, where there has been a serious unfair labor practice, a strike is protected and an employer may not discipline strikers or rescind the contract.

The advantage of this three-tiered analysis is that it augments the buffer zone created by the *Arlan's* serious/nonserious distinction. A union that strikes in response to an unfair labor practice risks the disciplining of strikers if the Board decides that the unfair labor practice was not serious. At the same time, however, an employer faced with such a strike must examine its own conduct before resorting to contract rescission, because it risks committing an additional unfair labor practice if the Board finds that an unfair labor practice contributed to the strike. I think this approach discourages hasty action by both sides and thereby contributes to both adherence to contracts and to industrial stability. In so doing, it encourages parties to resolve problems themselves rather than run to the Board about minor disputes.

This discussion of *Dow Chemical* is a good introduction to my overall topic. There are other areas where the Board has had the opportunity to contribute to the Act's purpose of industrial stability. Unfortunately, the Board has not always seized on those opportunities.

A case where I have chided my colleagues for missing an opportunity to encourage industrial stability is the recent Board decision in *Gould Corporation.*[6] *Gould* followed *Precision Castings,*[7] a case decided by a panel of Chairman Fanning and Members Jenkins and Murphy shortly after my appointment as a Board Member. *Gould* and *Precision Castings,* like *Dow Chemical,* addressed the rights of an employer faced with an unprotected strike in violation of a contractual no-strike clause. Here, however, the employer chose not to discipline all strikers, but selected only union officials for discipline. In both cases, charges were filed alleging that the officials were disciplined because of their union status rather than because of their participation in unprotected activity.

Before looking at the facts of *Gould* and *Precision Castings,* it is instructive to look at Board precedent concerning discipline of strikers in general. On many occasions, the Board has held that an employer faced with an unprotected strike could pick and choose among the participants rather than discipline everyone.[8] In a decision issued only a few months earlier, the same Board panel that decided *Precision Castings* affirmed an Administrative Law Judge who upheld the discharge of a steward based on his role as the "natural leader" of a strike by virtue of his union office.[9] Thus, the Board was no stranger to the notion that union office conveyed both greater authority to speak for employees and the duty to use that authority to uphold the contract.

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[6] 237 N.L.R.B. No. 124 (1978), *enf'd denied* Docket No. 78-2220, — F.2d — (3rd Cir. Dec. 27, 1979).

[7] Precision Castings Corp., 233 N.L.R.B. 183 (1977).

Meanwhile, a long line of arbitration decisions also held that an employer may selectively discipline strikers, particularly strike leaders. Many arbitration decisions went further and held that union officers and stewards had a duty both to try to prevent illegal strikes and to make every effort to end such an illegal strike once it began. An officer or a steward who failed to fulfill that duty was subject to more severe discipline than a mere employee-striker.[10]

Finally, the parties to collective bargaining agreements sometimes recognized the need for affirmative steps by union officials in the event of illegal strikes. Indeed, the unions in both *Precision Castings*[11] and *Gould*[12] were contractually bound to make reasonable efforts to end strikes in violation of the no-strike clause. Evidence of the parties' motivation in agreeing to include such a clause in the contract is not ordinarily presented in cases before the Board. However, I think we can assume that, if agreement to such a clause represents a concession on the union's part, a union that agrees to take steps to end illegal strikes may gain some concession in return from the employer.

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[8] See, e.g., California Cotton Cooperative Ass'n, Ltd., 110 N.L.R.B. 1494 (1954).

[9] Chrysler Corp., 232 N.L.R.B. 466, 474 (1977).

[10] See, e.g., United Parcel Serv., Inc., 47 LA 1100–01 (1966) (Schmertz, Arb.).

[11] N. 7 *supra* at 197.

[12] N. 6 *supra* at Slip. Op., p. 4.

Furthermore, there is at least a good argument that a union may well wish to include such an agreement to further its own internal objectives by discouraging the subtle undermining of its policies through wildcat strikes.

With this background in mind, let us look at *Precision Castings* and *Gould*. The facts in the two cases are remarkably similar. In both cases, stewards participated in work stoppages already in progress and made no effort to persuade employees to return to work. As I mentioned before, in both cases the contract obligated the union to take steps to end illegal work stoppages. Finally, in both cases the stewards were singled out for discipline—suspension in the case of *Precision Castings* and discharge in *Gould*—admittedly in part because as union stewards they were considered to have shirked a "higher duty" to abide by the contractual no-strike pledge. In *Gould*, there were some other factors involved in the discharge which ultimately led me to agree with the majority that the steward was discharged in violation of Section 8(a)(4) of the National Labor Relations Act, but those factors are not relevant to this discussion.

The Board majority in both *Precision Castings* and *Gould* found that the employers in those cases had violated Section 8(a)(3) of the Act by basing their decision to discipline the stewards who engaged in unprotected activity partly on the stewards' union status. *Gould* was considered by the full Board, and Member Penello and I dissented separately on this finding. Although our dissents took different approaches, a central theme in both was that the steward in that case failed to live up to his obligation as an agent of the union to aid in the enforcement of the contract. Member Penello and I were both of the opinion that the steward in that case did not merely participate in the work stoppage, but actually encouraged its continuation by announcing that he would not return to work until the grievance that provoked the stoppage was resolved. The majority apparently did not agree that this statement had a tendency to prolong the work stoppage, so the Board has not yet considered a case where we can agree on the facts and confine our disagreement to the legal issues.

As I suggested before, both unions and employers have a stake in enforcing the contractual no-strike pledge. A wildcat strike inevitably has a disruptive effect on the relationship between the union leadership and the employer. This effect is magnified when the union finds itself speaking with two voices: one, perhaps the union president, urging that the contract be followed and a grievance resolved through normal contractual procedures; the other, perhaps a steward or a committeeman, undermining the union's position by joining the strike.

It is also true that unions themselves abhor a true wildcat strike, for this makes it difficult for the union to achieve its objectives in its day-to-day dealings with the employer. The union also risks a finding that, by the participation of its officials in the strike, the union ratified the strike. Such a finding may result in liability of damages and possible rescission of the contract. Finally, a union is powerless in the face of an illegal strike to prevent the discipline, including discharge, of masses of employees if the employer chooses to take this step.

The employer's interest is more obvious. Employees may be expected to look to their union officials for leadership, and a leader who shows up on the picket line cannot be said to have proved to be a positive force for adherence to the contract. At the same time, there may be a lurking suspicion that, for all the show being put on by the union, a "wink and a nod" to the picketers, supplemented by an absence of any real attempt to persuade employees to return to work, tells employees that the union secretly supports their job action. At the same time, other remedies may be unavailable to the employer. Indeed, the very impracticality of discharging an entire work force prompted the Board's policy of approving the selective discipline of wildcat strikers.

The logical question is, When does a steward have a duty to attempt to end an illegal strike? The *Gould* majority did not have to address this question, and there is no issued case in which I have had an opportunity to indicate where I would draw the line. In *Gould*, of course, there was an express contractual commitment to try to end wildcat strikes. The Board is currently considering a case where the contract itself contained a no-strike clause, but with no additional affirmative undertaking to end wildcat strikes; there was, however, a long arbitration history showing that officers and stewards were subjected to heavier penalties than rank-and-file employees for engaging in unprotected strikes. There are, no doubt, other cases coming up the pipeline, prompted by the *Precision Castings* grant of a previously unsuspected shield for union officials who engage in unprotected activity, which raise other distinctions in this area.

Some may argue, in addition, that, because union stewards and officers acquired certain benefits by virtue of their union status, they ought to undertake the responsibility of upholding the contract. Among the benefits accorded to officers and stewards under some contracts is superseniority for certain purposes, which is restricted by the Board's *Dairylea*[13] doctrine. *Dairylea* is another area where the Board can vitally affect the peaceful administration of collective bargaining agreements, and I would like to turn now to the Board's policy in this area, particularly the Board's relatively recent decisions in *A.P.A. Transport*[14] and *American Can.*[15]

Oddly enough, the Board recognized the practice of giving superseniority to union officials long before it ever considered whether the practice was lawful. In 1956, in a case involving an employer's refusal to bargain, the Board found that one of the unlawful unilateral changes made was the rescission of superseniority for officers and bargaining committee members, and the Board ordered that the superseniority be restored and the laid-off officers be recalled.[16]

The Supreme Court acknowledged the practice even earlier. In 1949, in a case arising under the Selective Training and Service Act, the Court noted that superseniority for union chairmen and other officers was not uncommon, arbitrary, or discriminatory and, therefore, did not infringe on the rights of a World War II veteran who was laid off before certain officials who had acquired superseniority.[17] The Court found that superseniority was a common practice, justified by the need to assure continuity in office for stewards and chairmen.

Finally, in 1975, the year that *Dairylea* was issued, major employers and unions apparently felt that there was merit in compensating those union officials who had a role in administering contracts through the use of superseniority. The Bureau of Labor Statistics' Office of Wages and Industrial Relations conducted a study of major collective bargaining agreements in 1975 and reported the findings of that study in 1977.[18] Of the contracts surveyed, 43 percent granted some type of superseniority to certain union representatives. Of those, nearly a quarter went beyond layoff and recall—13 percent granted superseniority for all purposes.

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[13] Dairylea Cooperative, Inc., 219 N.L.R.B. 656 (1975).

[14] A.P.A. Transport Corp., 239 N.L.R.B. No. 165 (1979).

[15] American Can Co., 244 N.L.R.B. No. 78 (Aug. 30, 1979).

[16] Proof Co., 115 N.L.R.B. 309 (1956).

[17] Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

In 1975, the Board issued its *Dairylea* decision. There, a Board majority of then-Chairman Murphy and Members Jenkins, Kennedy, and Penello found that, although superseniority for purposes of layoff and recall was proper, a clause that did not limit superseniority to those two purposes was presumptively unlawful and must be justified on the specific facts of each case.

Then-Member Fanning dissented in *Dairylea* on the ground that a grant of superseniority was not invidious discrimination based on union membership, but merely recognized and encouraged service to the unit as a steward. He therefore would find an unlimited grant of superseniority unlawful only if there were evidence of an unlawful purpose or effect rather than require the employer and union to establish a lawful purpose.

Early in 1979, in *A.P.A. Transport,* the Board again considered the *Dairylea* issue, and I had an opportunity to express my views on one aspect of *Dairylea*—namely, what forms of superseniority were proper. In September 1979, in *American Can,* I was able to address the other issue in *Dairylea,* that is, the question of which union officials may be given superseniority. I will address these cases separately.

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[18] U.S. Dep't of Labor, Bureau of Labor Statistics, "Characteristics of Major Collective Bargaining Agreements, July 1, 1975," 1977 Bulletin—18644. The study covered 1,514 major private sector collective bargaining agreements—i.e., those covering more than 1,000 employees—of which 644 included some form of superseniority clause. The figures which follow result from an intensive analysis of these 644 agreements.

The contract in *A.P.A.* granted stewards superseniority "for all purposes including layoff, rehire, bidding, and job preference." The Regional Director had already concluded that the clause was lawfully applied by the parties in allowing a steward to bid on a particular route and had refused to issue a complaint on the issue of the application of the clause. However, the Board was presented with the question of whether the clause itself was presumptively invalid on its face.

A Board majority of Members Jenkins, Penello, and Murphy observed that the union and the employer had not justified the use of superseniority for job preference or "all purposes" and therefore had not rebutted the presumptive illegality of those provisions. Members Jenkins and Penello would have found the grant of superseniority for bidding illegal because, although it was used lawfully on the occasion involved there, the clause itself did not limit the use of superseniority for bidding in order to keep the steward near the plant. Thus, in their view, there was no guarantee that the clause would be applied lawfully in bidding situations in the future.

In previous cases, Member Murphy had made it clear that she would allow the use of superseniority for layoff, recall, shift assignment, or retention of the same job or same category of job.[19] In *A.P.A.*, she found that a justification had been established to rebut the presumption of illegality of the grant of superseniority for bidding and, therefore, found that portion of the clause valid.

Chairman Fanning and I would have found the superseniority clause valid in its entirety, absent evidence of unlawful application. In my separate opinion, I pointed out that such a clause was not intended merely to serve internal union objectives. In my view, encouraging the highest quality of performance in enforcement of collective bargaining agreements benefits the union, the employer, and, most important, the employees in the unit. It is therefore appropriate to compensate employees who take on the additional responsibilities of administering the contract in the same manner as one might compensate an employee for taking on any other work-related responsibilities or for possessing some particularly valuable work-related skill.

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[19] See cases cited in A.P.A. Transport, N. 14 *supra* at n. 6.

The *Dairylea* majority rejected the argument that service as a steward merited contractual recognition and privileges and suggested that, if such service was valuable, perhaps a union should pay stewards or give them "other nonjob benefits."[20] This suggests that administration of contracts is of value only to unions, a conclusion which would come as a surprise to the authors of the Act we administer.[21]

The benefit to employees—particularly those who come to union officials for assistance on grievances—is apparent. The Supreme Court has recognized that "it is deemed highly desirable that union chairmen have the authority and skill which are derived from continuity in office."[22] But the value to employers is also great. A grievance that is botched through inexperience or unfamiliarity with the contract may subject the union to liability for breach of its duty of fair representation. But employers should be aware of their own potential backpay liability if the grievance is found to have merit,[23] even though the employer may have had a good-faith belief that the grievance was satisfactorily settled or finally arbitrated.

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[20] Dairylea, N. 13 *supra* at 659.

[21] "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes . . . ." NLRA § 1, as amended.

[22] Aeronautical Lodge v. Campbell, N. 17 *supra* at 528.

As I mentioned earlier, *A.P.A.* did not address the question of which officials may receive superseniority. This question was addressed by *American Can.* A little background is in order.

In mid-1977, a Board majority of Fanning, Murphy, and Walther found lawful a grant of superseniority to the union recording secretary in *Limpco Manufacturing.*[24] The Board majority found that this officer's duties bore "a direct relationship to the effective and efficient representation of unit employees." Member Murphy noted that she would allow superseniority for officers whose functions relate in general to furthering the bargaining relationship. In dissent, Members Jenkins and Penello questioned whether there was any way to draw the line between those officers who did and those who did not have the requisite duties and argued that superseniority could become a reward for "good" union members who were appointed to various specious posts within the union.

The Third Circuit affirmed the Board's *Limpco* decision.[25] In so doing, the Third Circuit characterized the Board's decision as holding "that the [*Dairylea*] presumption of lawfulness of superseniority provisions extends also to union officers *because* they play a role in contract administration. [Emphasis added.]" The Third Circuit concluded that the recording secretary's duties in this regard "bore a direct relationship to the effective and efficient representation of the unit employees in implementing the collective bargaining agreement."

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[23] See, e.g., Miranda Fuel Co., 140 N.L.R.B. 181 (1962), De Arroyo v. Sindicato, 425 F.2d 306 (1st Cir. 1970), and Ruzicka v. General Motors, 523 F.2d 306 (6th Cir. 1975). But see Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082 (9th Cir. 1978), where only the union was liable for back pay, and United States Postal Service, 240 N.L.R.B. No. 178 (1978), where the employer was only secondarily liable for back pay because it tried to mitigate the hardship on the affected employees.

[24] Local 623 (Limpco Mfg., Inc.), Radio & Machine Workers, 230 N.L.R.B. 406 (1977).

Meanwhile, in *American Can,*[26] the Board had issued another decision raising the same issue. The Board moved to withdraw the record in that case for reconsideration in light of the Third Circuit's decision which seemed to modify the Board's reasoning in the *Limpco* case. The original *American Can* decision had upheld superseniority for, among others, a guard and union trustees, relying on *Limpco.*

Upon reconsideration, a majority consisting of Members Jenkins, Penello, and Murphy concluded that the General Counsel had rebutted the presumption that the union officers were lawfully accorded superseniority by showing that one trustee and the guard were not engaged in contract administration. Members Jenkins and Penello would have found superseniority lawful only when the officers also served as stewards or otherwise engaged in administration of the contract at their jobs.

Chairman Fanning and I dissented, repeating some of the views expressed in our separate *A.P.A.* dissents. We stated that, so long as the superseniority clause met tests of reason and good faith, we would find it presumptively lawful. We declined to second-guess unions as to which officers aided in enforcing or administering a contract.

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[25] Anna M. D'Amico v. NLRB, 582 F.2d 820 (3rd Cir. 1978).

[26] American Can Co., 235 N.L.R.B. 704 (1978).

We also pointed out that the majority's position "put the employer in the impossible position of trying to determine to which officials it can lawfully give superseniority." It should be noted that if an employer agrees to an unlawful superseniority clause, it, along with the union, is liable to employees. Yet, I question whether an employer can determine which officials administer the contract without unduly probing into the union's internal affairs. In my view, placing this kind of burden on an employer simply invites tensions between the parties to a collective bargaining agreement. I do not see the risk, referred to by Members Jenkins and Penello in *Limpco,* of sudden appointments to specious union posts in order to reward "good" union members. I think such a transparent device would not gain the agreement of most law-abiding employers, and there is no need to cripple the parties' ability to insure effective administration of contracts merely to guard against such an obvious ploy.

Finally, I would like to touch briefly on the Board's deferral to final arbitration awards—the *Spielberg*[27] issue. *Spielberg,* which issued in 1955, held that the Board would defer to an arbitration award where the proceedings appeared fair and regular, all parties agreed to be bound, and the decision of the arbitrator was not clearly repugnant to the purposes and policies of the Act.

In *Kansas City Star,*[28] issued in mid-1978, I had the opportunity to express my views in this area and joined Members Penello and Murphy in deferring to an arbitrator's award. The *Kansas City Star* majority reviewed the record evidence, satisfied ourselves that there were no irregularities in the proceedings and no errors on the face of the arbitrator's factual findings, and examined the arbitrator's legal conclusions to see if, on the facts found, those conclusions were consistent with Board law. Having found no departure from Board law and observing that the arbitrator considered Board precedent in ruling on the discharges in *Kansas City Star,* the majority deferred to the arbitrator's decision.

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[27] Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

[28] Kansas City Star Co., 236 N.L.R.B. No. 119 (1978).

The dissenters, Chairman Fanning and Member Jenkins, took a different tack. In my concurring opinion, I said they seemed to be treating an arbitrator like a hearing officer by making their own independent review of the evidence and affirming only as much of the arbitrator's factual findings as was consistent with their reading of the record. The two different approaches resulted in unanimous agreement to defer to the arbitration award upholding the discharge of ninety-four of ninety-five strikers; the disagreement arose with respect to the ninety-fifth striker.

In my view, regardless of the outcome of the two approaches taken, that of the *Kansas City Star* majority is more consistent with the strong labor policy favoring voluntary arbitration.[29] In noting this established policy, I do not mean to pass on any aspect of the *Collyer*[30] doctrine. The *Spielberg* and *Collyer* doctrines, although predicated on similar policy considerations, are distinct legal concepts which should not be needlessly confused. In the *Spielberg* context, once the parties have gone to the trouble and expense of an arbitration proceeding which meets our standards, I believe it is unwise to reduce the arbitrator's role to that of a mere hearing officer. A laborious review of the evidence followed by a willingness to substitute our judgment for that of the arbitrator undermines the theoretical underpinnings of

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[29] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[30] Collyer Insulated Wire, 192 N.L.R.B. 837 (1971). See also General American Transp. Corp., 228 N.L.R.B. 808 (1977), and Roy Robinson Chevrolet, 228 N.L.R.B. 828 (1977).

Spielberg as well as the integrity of the arbitral process in general.

At the end of September 1979, the Board issued its *Atlantic Steel*[31] decision, in which we considered an arbitrator's decision that confined itself to contractual legal issues and did not address Board precedent. Member Murphy and I noted that, while Board decisions have indicated that it is preferable for an arbitrator to address unfair labor practice issues directly, the Board had deferred where the arbitrator considered all the evidence relevant to the unfair labor practice in making his award. Because the arbitrator's award in *Atlantic Steel* took into account all the evidence, including alleged harassment of the discharged employee and the context of an encounter with his supervisor in which the employee was allegedly insubordinate, we held that we would defer to the arbitrator's factual findings. We further found that the arbitrator's award was not repugnant to the Act, because we found that the employee was not engaged in protected concerted activity when he used obscene language to a supervisor on the production floor during working time in a setting which, we concluded, did not provoke his outburst. We noted that a contrary result would shield "any obscene insubordination short of physical violence" so long as the insubordination occurred in the context of any offhand complaint to a supervisor.

Member Penello agreed with the result in *Atlantic Steel* for reasons stated in a separate concurrence, and Chairman Fanning and Member Jenkins did not participate.

A pending case presents an interesting question: That is, what constitutes an arbitration decision? In the case I have in mind, the employer and the union agreed on a somewhat unusual procedure. Before disciplining an employee, the employer was obligated to notify the union of its intention to impose discipline. The union could, if it chose, object to the proposed discipline and take the case to arbitration while the proposed discipline remained in abeyance. In the case of a discharge or suspension, this would mean that the employee would continue to work and draw his pay until the arbitrator upheld the proposed discipline. If the union chose not to object, the employee could still utilize the grievance procedure after discipline had been imposed. In either event, there was only one arbitration per disciplinary action; the only question was whether it would occur before or after the discipline was imposed.

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[31] Atlantic Steel Co., 245 N.L.R.B. No. 107 (Sept. 28, 1979).

In the case before the Board, the union chose to object to a proposed discharge of a group of employees who allegedly engaged in a work stoppage despite a no-strike clause. The parties took the case before an arbitrator, who upheld some of the proposed discharges and reduced others to reprimands. The employees still subject to discharge, who were union stewards, filed charges with the Board alleging a violation of Section 8(a)(3) under the Board's *Precision Castings* doctrine. The arbitrator found that the stewards not only participated in an illegal work stoppage, but actually led it. The Administrative Law Judge reached somewhat different conclusions. He found, first, that there was no work stoppage and, second, that the stewards played no leadership role.

Although the case presents several challenging issues, the one I find most interesting is whether the award resulting from the contractual procedure is an arbitration award within the meaning of *Spielberg*. The ALJ observed that the employer was not obligated to discharge an employee even after the arbitrator approved the reasons for the discharge and concluded from that fact that the award was merely a "license" rather than an award cognizable under *Spielberg*. It is a little early to go into the merits of the case, so I will only observe that the concept of a predischarge arbitration is an intriguing one.

Before concluding, I want to be sure that I have not left you with the impression that I consider adherence to contractual procedures as an end to be desired above all others. I do believe that, for the most part, the kinds of policies I have espoused help foster industrial stability. But it is also true that there are instances where it is undesirable to insist that the agreement between the parties be adhered to.

The obvious example, of course, is where the parties have agreed to an unlawful condition for bestowing certain benefits, such as discrimination based on race, sex, or other invidious factors. A second example, addressed by the three-tiered approach I took in *Dow Chemical,* is where one party has so seriously breached the contract or violated the Act that the integrity of the collective bargaining relationship has been seriously endangered.

Nevertheless, in these days of burgeoning case loads, it does not serve unions or employers to come to the Board, the courts, or other forums when the parties' own contractual procedures can address the wrong sought to be righted—or, in the case of *Spielberg,* where a qualified fact finder has already considered the issues raised in a context that provided the parties with adequate opportunity to present the evidence and legal arguments. At the same time, utilization of the contractual procedures clarifies the problems in the relationship and, in my opinion, enhances the effective practice of collective bargaining by focusing attention on the real concerns of the parties.

In the final analysis, the Board simply cannot oversee the day-to-day relations between the parties. Our function, as I view it, is to intervene when the policies of the

Act will be jeopardized by the course being taken by the relationship between an employer and a union. The General Counsel plays a pivotal role in the ability of the Board to get involved in appropriate cases, through his discretion in issuing complaints and his administration of the Board's regional offices.

COMMITTEE ON HUMAN RESOURCES
UNITED STATES SENATE

MEMORANDUM

September 9, 1980

TO: Chairman Harrison A. Williams, Jr.

FROM: Arthur Luby

SUBJECT: Nomination Hearing of John Truesdale (Reappointment, National Labor Relations Board): Analysis of NAM and Chamber of Commerce Testimony

I have now completed the analysis that you requested on the National Association of Manufacturers and Chamber of Commerce testimony and statements regarding Mr. Truesdale's record as a Member of the NLRB for the past three years.

The National Association of Manufacturers is circulating a discussion of John Truesdale's record as a Member of the National Labor Relations Board. The NAM statement, originally delivered at Truesdale's nomination hearing, is to the effect that Truesdale demonstrated a pro-labor bias in his decisions as a Board Member. Consistent with this approach, NAM and the Chamber of Commerce have orchestrated a letter-writing campaign against Truesdale's renomination on grounds of alleged anti-business prejudice.

The scope and vehemence of the attack on Truesdale is virtually unprecedented and givesthe complaints against him an air of substance which is simply not borne out by an examination of his work as a Board Member. By any reasonable standard, Truesdale's record is that of a moderate who, ideologically, is in the middle of the Board. In this regard, the NAM and Chamber discussions of his record contain a number of misstatements of Board rulings in addition to highly prejudicial omissions of relevant Truesdale opinions which do not square with their theory of pro-labor bias.

The most serious attack is the Chamber's and NAM's contention that Truesdale has attempted through his decisions to implement Labor Law Reform. While, in the hearings, he was accused at various times of attempting to implement the entire bill, the cases cited relate only to the issue of "equal access". The major example put forth in support of this proposition is Florida Steel Corp., 242 NLRB No. 195 (1979), in which the Board gave an access remedy to the Steelworkers Union in response to the company's recidivist record.

Much was made of the Fifth Circuit's ruling on the propriety of this remedy. In fact, the Federal court enforced the Board's order insofar as it pertained to Florida Steel plants which were already unionized. It refused to allow the Board to apply the remedy only as to those plants not already unionized.

The difference between the Board and the Federal court was not insignificant. However, "equal access" is a traditional Board method for dealing with serious aggravated recidivist conduct and has been approved of by a number of Federal courts. For example, see Hedstrom v. NLRB 558 F2d. 1151 (3rd Cir. 1977).

Further, the Fifth Circuit, in ruling that the Board's company-wide access order was beyond the Board's power, was in conflict with at least two other Circuits. In J.P. Stevens & Co. v. NLRB 563 F2d 8 (CA 2, 1977) and J.P. Stevens & Co. v. NLRB 582 F2d 326 (CA 4, 1978), the Second and Fourth Circuits enforced Board orders granting union access to the respondent's property during working time in non-union plants. Therefore, the Fifth Circuit's holding represents a minority position and the Board can hardly be criticized for being in conflict with it.

Moreover, the notion that the case constituted an example of a Board attempt to legislate "equal access" within the meaning of the Labor Law Reform bill is preposterous. The "equal access" provision in Labor Law Reform specified that each time an employer made an anti-union speech in an election campaign, he would be required to give the union a chance to respond on company time. "Equal access" was not intended as a remedy for employer misconduct but as a general rule for all elections. In Florida Steel, by contrast, the remedy of union access was given in response to a series of unfair labor practices and anti-union conduct paralleled only by the notorious practices of the J.P. Stevens Company.

Notably, a case called Sambo's Restaurant 247 NLRB No. 122, is also cited as an example of an attempt by Truesdale to legislate "equal access." Member Truesdale was not on the panel which decided the case. This is not the only example of NAM supporting its allegations through use of cases which Truesdale didn't decide.

Another major case used by the NAM and the Chamber to illustrate Truesdale's alleged bias is *General Knit of California* 239 NLRB No. 101 (1978). That case reinstituted the Board's longstanding policy of overturning election results when the victor was guilty of serious factual misstatements at the end of a campaign.

In his testimony in the first hearing, Robert Thompson, the Chamber's representative and a well-known management labor law attorney, stated he had no basic problems with the result in that case. This is not surprising in that *General Knit* overturned a union election victory at the instance of the employer. Incredibly, though, the Chamber, which Mr. Thompson represented, continued to criticize the case at the second hearing despite Thompson's earlier statement.

Another point made by the Chamber and NAM is that Truesdale has failed to "defer" often enough to arbitration results. This is completely inaccurate. Truesdale has strongly supported deferral throughout his term, and his application of the principle of deferral to arbitration has remained completely consistent, recognizing that uniform application of the principle requires different results depending on the facts presented in each case.

One of the few instances in which Truesdale failed to defer to an arbitrator's decision was *Suburban Motor Freight* 247 NLRB No. 2 (1979). There the arbitrator did not have before him the facts relevant to the petitioner's unfair labor practice complaint.

IT IS AXIOMATIC THAT THE BOARD MAY DEFER TO AN ARBITRATION RESULT ONLY IF IT IS NOT REPUGNANT TO THE PURPOSES OF THE ACT, SPEILBERG MFG. CO. 112 NLRB 1080 (1955). AN ARBITRATION DECISION WHICH DID NOT TAKE INTO ACCOUNT THE FACTS RELEVANT TO AN EMPLOYEE'S UNFAIR LABOR PRACTICE CLAIM OBVIOUSLY PROVIDES NO ASSURANCE THAT THE ACT'S FUNDAMENTAL ADMONITION TO PROTECT EMPLOYEE RIGHTS WAS FULFILLED. THEREFORE, THE BOARD'S DECISION IN SUBURBAN MOTOR FREIGHT WAS CLEARLY REASONABLE.

SUBURBAN MOTOR FREIGHT CONSTITUTES AN EXTREMELY LIMITED EXCEPTION TO THE GENERAL PRINCIPLE OF DEFERRAL. SINCE THAT CASE MEMBER TRUESDALE HAS MADE CLEAR THAT ALL THE ARBITRATOR MUST DO IS CONSIDER THE FACTS RELEVANT TO THE UNFAIR LABOR PRACTICE CLAIM. HE NEED NOT DIRECTLY RULE ON THE CLAIM ITSELF. CHEMICAL LEAMEN TANK LINES 251 NLRB No. 146 (1980), B&K INVESTMENT 248 NLRB No. 167 (1980), BAY SHIPBUILDING 251 NLRB No. 114 (1980). THE PREREQUISITE TO DEFERRAL ESTABLISHED IN SUBURBAN MOTOR FREIGHT IS A SENSIBLE SOLUTION TO THE CONFLICT BETWEEN THE BOARD'S DUTY TO PROTECT EMPLOYEE RIGHTS AND THEIR COMMITMENT TO ARBITRATION AS AN EFFICIENT METHOD OF SETTLING INDUSTRIAL DISPUTES. SUBURBAN MOTOR FREIGHT AND THE CASES WHICH HAVE BEEN DECIDED SINCE DEMONSTRATE CLEARLY THAT THAT COMMITMENT HAS NOT WEAKENED.

The Chamber's and NAM's discussion of the deferral issue is typical of their unbalanced discussion of Truesdale's record. Virtually every pro-management ruling made by John Truesdale brought to the attention of the opposition was derided as somehow insignificant or insincere. For example, throughout his term Truesdale consistently ruled to withhold the protections of the Act from supervisors and all supervisory-type personnel. Brothers Three Cabinets 248 NLRB No. 95 (1980); Sheraton Puerto Rico Corp. 248 NLRB No. 113 (1980); Fresno Townhouse 246 No. 167 (1979); and Nevis Industries, Inc. 246 NLRB No. 167 (1979). In a speech, John Irving, now a management attorney, complimented Truesdale on his handling of issues connected with the breadth of the supervisory exclusion.

Despite this, the Chamber contends that a case called Abilities and Goodwill 241 NLRB No. 5 (1979) "effectively blunt[s] the very exclusion that [Truesdale] ostensibly espouses." That case didn't even deal with a supervisory discharge but rather with the difficult issue of when employee protests over a supervisory discharge will be protected.

At the second hearing, Mr. Thompson sarcastically congratulated John Truesdale for recognizing that there is a supervisory exclusion.

Contrary to Mr. Thompson's remarks, there are a number of difficult and complex issues connected with the application of the supervisory exclusion, and John Truesdale has generally resolved these issues in favor of the employer. What this comment reveals, though, is that Truesdale's opposition is not interested in an evenhanded Board Member -- they want someone who will uniformly rule in their interests.

Still, as strained as the criticisms of Truesdale's rulings on the supervisory issue were, the most bizarre and inequitable attack on Truesdale's record relates to his position in United Dairy Farmers 242 NLRB No. 179 (1979).

In that case the employer's misconduct was so outrageous and indefensible that the Administrative Law Judge held that "to /That/ company the Board's conventional remedies are a mockery" and went on to grant the union a bargaining order, despite its inability to demonstrate majority status. This was done on the basis of the Supreme Court's discussion in NLRB v. Gissel Packing Co. 395 U.S. 575 (1969). Members Fanning and Jenkins voted to uphold the Administrative Law Judge's ruling. Member Truesdale, however, in casting the key vote rescinding the bargaining order, stated that he opposed a remedy "not commensurate with the principle of majority rule." He was later criticized by labor groups for his ruling.

The Chamber and NAM managed to find fault with Truesdale's handling of that case. They criticized him for leaving open the possibility that a bargaining order could issue in favor of

A UNION WHICH HADN'T PROVEN MAJORITY STATUS. IN FACT, TRUESDALE ONLY STATED THAT THE BOARD "MAY" HAVE THE POWER TO ISSUE A BARGAINING ORDER UNDER SUCH CIRCUMSTANCES -- IF THE EMPLOYER PRACTICES WERE PERVASIVE AND OUTRAGEOUS ENOUGH -- WITHOUT COMMITING HIMSELF TO EVER VOTING TO USE THAT POWER.

THIS RATHER CAUTIOUS ASSERTION WAS COMPLETELY CONSISTENT WITH THE SUPREME COURT'S HOLDING IN GISSEL AND IS A FAR LESS EXPANSIVE INTERPRETATION OF THAT CASE THAN THAT OF A NUMBER OF FEDERAL COURTS. SEE, FOR EXAMPLE, NLRB V. ARMCO INDUSTRIES 535 F2D 239 (3RD CIR. 1976).

IN ASSESSING THIS DISPUTE, I SHOULD NOTE THAT MEMBER TRUESDALE'S INTERPRETATION OF GISSEL IS ALSO LESS EXPANSIVE THAN THAT OF SENATOR HATCH. FOR AT THE TRUESDALE HEARING SENATOR HATCH AGREED WITH THE PROPOSITION THAT THE BOARD, UNDER SOME CIRCUMSTANCES, DEFINITELY DOES HAVE THE POWER TO ISSUE A BARGAINING ORDER ABSENT A SHOWING OF MAJORITY STATUS BY THE UNION. HE ADDED THAT THAT HAS ALWAYS BEEN HIS POSITION. SEE HEARING RECORD OF SEPTEMBER 5, 1980, AT 158 AND 159.

IN ANY EVENT, IT SHOULD BE CLEAR THAT IN ITS 45-YEAR HISTORY THE BOARD HAS NEVER APPROVED A BARGAINING ORDER IN FAVOR OF A UNION WHICH FAILED TO SUBMIT PROOF OF MAJORITY STATUS. FURTHER, BARGAINING ORDERS REMAIN AS INFREQUENT AS EVER. BOARD ELECTIONS ARE THE ROUTE TO CERTIFICATION IN 99 PERCENT OF THE CASES.

IT CANNOT (AND SHOULD NOT) BE CLAIMED THAT NONE OF TRUESDALE'S OPINIONS IS CONTROVERSIAL. IN THREE YEARS AS A BOARD MEMBER HE

HAS PARTICIPATED IN NEARLY 2500 CASES, AND SOME DIFFERENCES OF OPINION AMONG PRACTITIONERS OF LABOR LAW ABOUT HIS DECISIONS IN A FEW OF THOSE CASES IS NEITHER UNUSUAL NOR UNEXPECTED. BUT THE SINGULAR UNFAIRNESS OF THE CHAMBER'S AND NAM'S DISCUSSION OF TRUESDALE'S RECORD SHOWS CLEARLY THAT THEIR OPPOSITION IS NOT BASED ON A FAIR ASSESSMENT OF HIS RECORD. RATHER, THE ENTIRE RECORD OF EVENTS SINCE TRUESDALE WAS NOMINATED BY THE PRESIDENT -- THE CHAMBER AND NAM PRINTED MATERIALS, THEIR WITNESSES' TESTIMONY AND RESPONSES TO QUESTIONS, AND NOW THEIR LETTER-WRITING CAMPAIGN -- EVIDENCES A STAGE-MANAGED ELECTION YEAR ATTEMPT TO BRING ABOUT A REPUBLICAN BOARD WITH PRO-MANAGEMENT MEMBERS. THIS, AND NOT TRUESDALE'S RECORD, IS WHAT THE CALLS FOR "BALANCE" ON THE BOARD IN THE LETTER-WRITING CAMPAIGN ORCHESTRATED BY THE CHAMBER AND NAM REFER TO. NO ONE SHOULD BE MISLED INTO BELIEVING THAT THE ATTACKS ON TRUESDALE AMOUNT TO ANYTHING ELSE.

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September 18, 1980

Honorable Harrison C. Williams
Chairman,
Senate Labor & Human Resources
Committee
United States Senate
Washington, D.C. 20427

Honorable Orrin Hatch
Senator,
Senate Labor & Human Resources
Committee
United States Senate
Washington, D.C. 20427

Re: Nomination of Honorable
John C. Truesdale

Dear Senators Williams & Hatch:

Having been engaged in hearings almost constantly for the past ten days, it has only been today that I have been able to read reports on the two hearings before your committee on the nomination of John Truesdale for a five-year term on the National Labor Relations Board.

This letter represents my personal views and not the views of any of my partners or associates, none of whom has been consulted on this subject.

Since 1956, I have maintained an active and successful practice representing employers in labor relations matters. For the past ten years I have also served as a neutral arbitrator of labor disputes and probably have been chosen as a neutral by a good hundred of the "Fortune 500". From 1950 to 1956, I worked as a lawyer for the Board, starting off as a legal assistant to a Board member and continuing as a trial lawyer in a number of field regional offices. I think I know a good bit about the Board, its members and former members, its personnel and its enforcement of the LMRA and its predecessors over the past 30 years.

I have known John Truesdale since 1950. He was the best Field Examiner I ever worked with. It was a pleasure to try a case which Mr. Truesdale investigated. His witnesses said what he said they would say. He is objective, honest, bright and knowledgeable. He is eminently well qualified to be a member of the National Labor Relations Board. He does not have a pro-union or a pro-management bias; he is objective.

Moreover, as a career Board employee, who has worked his way from the lowest professional rating in the Agency to Board member, always on merit, and never through political or personal contact, Mr. Truesdale stands as proof that the Horatio Alger myth works within Government as well as in fiction. To deprive Mr. Truesdale of confirmation on the basis of mistaken and erroneous comments from well-meaning but unknowledgeable lobbyists is to strike a body blow to the Career Service. "Rise to the top on merit and then the special interests will pick you off".

Neither the Chamber nor the NAM speaks for the 10,000 management lawyers in this country. If you want to know how they feel about Mr. Truesdale, poll them. My guess is that he would be endorsed by most of them.

With kindest regards, I am,

Respectfully,

Bernard Marcus

BM/lgi

VICTOR FEINGOLD
COUNSELOR AT LAW

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September 2, 1980

Hon. Harrison Williams
United States Senate
Washington, D.C. 20510

Re: Re-appointment of John Truesdale, Esq. as a member of the National Labor Relations Board

Dear Senator Williams:

I am writing to you to register my protest to the unfair and baseless statements issued by the U.S. Chamber of Commerce and others, who oppose the re-appointment of Member John Truesdale to the National Labor Relations Board.

I have specialized in the practice of labor relations law for approximately thirty years. During that period, I have served as a member and more recently, as its outgoing Co-Chairman, of the American Bar Association's Committee on "Practice and Procedure under the National Labor Relations Act". A substantial part of my practice is devoted to cases before the Board which afforded me broad opportunities to meet with members of the Board, its staff and personnel from the Office of General Counsel. Thus, I believe that I am in a position to make a valid appraisal of Mr. Truesdale, his abilities and his service in government and as a member of the Board. Our Committee had constant communications and meetings with the Board's liaison committee of which Mr. Truesdale was an active participant and an important contributor in resolving problems and questions raised by the labor law bar.

Since Member Truesdale's appointment to the Board in 1977, he has written many prevailing and dissenting opinions which disclose his independence, fairness, impartiality and a complete absence of favoritism for any of the interests involved in NLRB proceedings. A tenuous and unfounded criticism has been made to the effect that Mr. Truesdale is completely labor union oriented. A reading of his opinions negates the possibility of any such construction or conclusion.

The second objection raised is that Mr.Truesdale is a career public servant, having been progressively elevated through the ranks from Field Examiner to Executive Secretary of the Board and to membership on the Board. In my view, the success of our Civil Service System depends largely on career employees who apply themselves diligently to their tasks because of the inducement that those with merit will advance according to their skills and industry. Unless civil servants can rely on such promise for recognition and advancement the system will be over-run largely with new hires and incompetents. Will a person from outside the agency prove more adept in the analysis and the solution of perplexing industrial problems than the highest type of career public servant as is Member John Truesdale? While I admit that such experts may be found elsewhere, the monetary inducements have not been attractive to lure such persons to the agency.

I am more inclined to believe that the opposition raised to Mr. Truesdale is not real, but is merely dilatory and feigned for the purpose of postponing his confirmation, until after the November election, as was reported in the press earlier this month.

In sum, I can think of no candidate in the field at this time who is better qualified as a member of the Board. I urge your Committee to rush confirmation before the forthcoming adjournment.

I trust that you will circulate copies of my letter to the Honorable Senators now serving on the sub-committee, assuring you that this letter was not solicited by anyone and was only prompted by the unmerited statements appearing in the press.

Respectfully,

Victor Feingold

Victor Feingold

VF:ls

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September 8, 1980

Honorable Harrison A. Williams
Chairman, Senate Human Resources
Committee
U. S. Senate
Room 4230 - Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Williams:

I am angered and outraged to read of the arguments being advanced by the Chamber of Commerce and certain Republican Senators to thwart President Carter's appointment of John C. Truesdale to serve a full five-year term on the National Labor Relations Board. At the outset I want to note that I am an attorney and represent organized labor.

The opposition to Mr. Truesdale appears to be based upon the premise that under prior Republican administrations certain attorneys who represented management interests were appointed to positions on the National Labor Relations Board and also to the General Counsel's position and that the philosophy of those appointees, who now have for the most part returned to their jobs of representing management interests, should remain controlling as to the future interpretation and application of the National Labor Relations Act.

In essence, the fact that Jimmie Carter was elected President in 1976, in no small part because the electorate expressed their will that a change was needed, including a change in the direction the NLRB had gone, means nothing to the Chamber of Commerce and others of such ilk, because what such interest groups want is to really thwart the President in attempting, by his powers of appointment, to fulfill the commitments made to the electorate.

One needs only to look back to the past appointments made to the NLRB by Republican Presidents and what we see are attorneys from law firms that represented management or have since gone to law firms that represent management. In this category are former Chairman Ed Miller, Board member Walther, Board member Ralph Kennedy, General Counsel Peter Nash, and General Counsel John Irving. I would ask just how many former Board members or General Counsels have ever been selected from the ranks of those attorneys who represent labor's interests or how many have after leaving such positions taken positions with organized labor?

Apparently, the business interests in this country have the attitude that only those who have previous experience representing management and who will return to management have either the integrity or qualifications to properly administer the NLRA and quite frankly, I say this is "hogwash".

The business interests seem to believe that the decisions of the past "Miller Board" are somehow to be treated as if they were the ten commandments and were handed down from above for all time. The fact is that such decisions came from men who, for the most part, had or who are now representing management interests and many of those decisions were inimical to one of the most basic underlying policies of the NLRA, namely to promote good faith collective bargaining.

Quite frankly, I would rather have seen President Carter appoint some member to the NLRB whose background was totally aligned with that of organized labor the same as when Republican Presidents saw nothing wrong with appointing persons whose whole prior experience before and after appointments were identified with those of management.

I will not accept the premise that only attorneys who have represented management have the necessary integrity or qualifications to impartially interpret and administer the NLRA. There are many excellent attorneys as well as persons who while not being attorneys have nonetheless worked representing labor organizations and have as good, if not better, qualifications to be appointed to NLRB positions as were those appointed under Republican administrations.

However, President Carter has opted to appoint Mr. Truesdale to the vacancy on the NLRB and if any group should be objecting, it should be that of labor. However, for the Chamber of Commerce and other such business groups to object to Mr. Truesdale's appointment really takes chutzpa. Those objecting to Mr. Truesdale's appointment are not interested in getting someone in his place who would be more impartial or bring more integrity to the position than Truesdale has brought but rather what the objectors want is someone to be appointed who knows how to write and has written employer briefs so that these employer briefs can become the decisions of the NLRB. This is not being impartial and I would

urge the Senate Human Resources Committee to conclude its hearings and recommend the nomination of John Truesdale for confirmation as soon as possible.

Very truly yours,

HABUSH, HABUSH & DAVIS, S.C.

BY

KENNETH R. LOEBEL

KRL:cb

cc: Senator Gaylord Nelson
John C. Truesdale

The University of Toledo

2801 W. Bancroft Street
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(419) 537-2882

SEP 10 AM 9:43

September 4, 1980

Senator Harrison A. Williams, Jr.
Chairman, Senate Labor and Human
Resources Committee
U. S. Senate
4230 DSOB
Washington, D. C. 20510

Dear Senator Williams:

I am forwarding you this letter in regard to reconfirmation hearings concerning National Labor Relations Board Member John C. Truesdale which I understand are now being held before your Committee. I have read Mr. Truesdale's renomination might spark some controversies for allegedly "pro-labor bias."

As a law professor in the area of labor law and as a former practitioner representing primarily management clients, I have studied Member Truesdale's opinions over the past few years. His decisions, in my opinion, have always been well-considered and well-written. One might quarrel with his position on certain matters, but no one can question his integrity or any alleged prejudices against parties who appear before the Board.

I urge your Committee to reaffirm Mr. Truesdale's position as a member with the National Labor Relations Board.

Sincerely,

Timothy J. Heinsz
Associate Professor of Law

TJH:mr
CC: Senator Orrin D. Hatch
Member John C. Truesdale

299 PARK AVENUE
NEW YORK, N.Y. 10017

August 25, 1980

United States Senate
Committee on Labor and
  Human Services
Washington, D.C. 20510

Gentlemen:

I am pleased to write you in support of the nomination of John Truesdale for another term as a member of the National Labor Relations Board. I am a member of the law firm of Debevoise, Plimpton, Lyons & Gates in New York City, and I have represented employers in labor law matters for many years. I have been Chairman of the Labor Committee of the Association of the Bar of the City of New York and Chairman of the Labor Committee of the Administrative Law Section of the American Bar Association, and for the past year, I served as Chairman of the Administrative Law Section of the American Bar Association.

I first met Mr. Truesdale when he, as Executive Secretary of the National Labor Relations Board, addressed the City Bar Association's Labor Committee some ten years ago, and I was highly impressed by him at that time. In 1976 and 1977, when I served as a member of then Chairman Murphy's Task Force on the National Labor Relations Board, John Truesdale and I were assigned to a small committee of the Task Force, and we worked very closely together. During this period, I found him a person of great integrity, independence and intelligence--indeed one of the best public servants that I have ever met.

Within the past few years I have talked with Mr. Truesdale and have listened to him speak at various labor-management functions, and have read a number of his opinions. Nothing has detracted from my view that he has retained his independence, integrity and highly intelligent approach to labor problems. I do not always agree with his conclusions, but I have not detected any bias against management in our conversations, in his speeches or in his opinions.

As a former Chairman of the Administrative Law Section of the American Bar Assocation (although I cannot speak for that Section or for the American Bar Association) I am deeply concerned about any tendency to make reappointment of an agency member turn solely on how the member voted. The policy judgments made by agency members are important, of course, and should not be ignored when reappointment is considered, but I would urge great circumspection before computer-type vote-counting is pursued. This care is particularly desirable in this case, a rare instance of a person who has served in an agency extremely well, has become one of the heads of the agency for a short period and now has been reappointed. I believe Mr. Truesdale deserves confirmation on the merits, and I believe it would be a serious miscarriage of our system if he were not confirmed.

Sincerely,

Joseph Barbash

LUXEMBURG & LUXEMBURG P.C.

LAW OFFICES
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MARC J. LUXEMBURG

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(212) 686-3640

September 9, 1980

Hon. Harrison Williams
Senate Office Building
Washington, D.C.

Re: Re-appointment of John Truesdale, Esq.
as a member of the National Labor
Relations Board

Dear Senator Williams:

The ratification of the re-appointment of John Truesdale is now pending before your sub-committee. I am taking the liberty of writing to you to indicate my support and the support of the scores of labor lawyers that I know and meet constantly in favor of confirmation.

I have practiced labor law for more than 35 years. I have appeared in approximately 1,000 cases before the National Labor Relations Board in various district offices. For almost 20 years I have been a member of the American Bar Association Committee on National Labor Relations Board Practice and Procedure. In that capacity, I was privileged to meet with many Board members as well as several general counsels and executive secretaries of the National Labor Relations Board.

John Truesdale has been an outstanding member of the Board. Examination of his decisions show not only deep knowledge of Board law, but outstanding impartiality in reaching decisions based upon facts.

Opposition to Mr. Truesdale's confirmation is obviously motivated solely for political considerations. His prior record as a Board Examiner, Executive Secretary and Member has been outstanding.

It would be a loss not only to the Labor Bar but to the country were John Truesdale not promptly confirmed.

May I respectfully request that you enter my letter in the files of the sub-committee and make its contents known to the other members.

Sincerely yours,

Harold L. Luxemburg

Chamber of Commerce of the United States
202-659-6104
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
NATIONAL ECONOMIC DEVELOPMENT DIVISION
LABOR LAW SECTION

August 29, 1980

The Honorable Harrison A. Williams, Jr.
Chairman
Senate Labor & Human Resources Committee
United States Senate
Washington, D. C. 20210

Dear Senator Williams:

During the August 22, 1980 confirmation hearing on the nomination of John C. Truesdale, you graciously acceded to our request that we be permitted to supply to the Committee examples of expressions of concern regarding the anti-business decisions of the National Labor Relations Board.

We have enclosed the following for the hearing record:

- John Irving's address before the American Bar Association's Section of Labor and Employment Law: Daily Labor Report No. 48, page D-1, March 10, 1980.
- Edward Miller's address at the American Bar Association's Annual Meeting: Daily Labor Report No. 156, page D-1, August 11, 1980.
- "NLRB Rulings Show Tilt Toward Labor Union Goals," Washington Report, Vol. 17, No. 25, page 3, December 11, 1978.
- "Labor Unions Rack Up Big Victories," Washington Report, Vol. 18, No. 18, No. 26, page 4, February 5, 1979.
- "Rulings in Seattle Bank Cases Reveal NLRB Tilt to Unions," Washington Report, Vol. 1, No. 5, page 2, August 13, 1979.
- "Rulings Tilt to Labor," Washington Report, Vol. 1, No. 21, page 1, December 10, 1979.

- "NLRB Outshines Congress in 'Reforming' Labor Law," The Regulatory Action Network: Washington Watch, Vol. I, No. 3, page 1, July, 1979.
- "NLRB -- Leaning to the Left?" The Regulatory Action Network: Washington Watch, Vol. II, No. 2, page 5, February, 1980.

Sincerely,

G. John Tysse

Enclosures

cc: Steve Sacher
Derryl Anderson, Esq.
Labor & Human Resources
Committee

BNA's Daily Reporter System
DAILY LABOR REPORT

FULL TEXT SECTION

3-10-80

(No. 48) D - 1

ADDRESS BY JOHN S. IRVING, JR, AND CARL L. TAYLOR ON LIMITS OF JUDICIAL DEFERENCE TO NLRB EXPERTISE
(TEXT)

(Note: The address was delivered by Irving, former NLRB general counsel, on March 8 before the American Bar Association's Section of Labor and Employment Law in Marco Island, Fla. Irving and Taylor are members of the Chicago-based law firm of Kirkland & Ellis.)

The statutory relationship between the Board and the appellate courts reviewing its decisions has always been subject to a certain amount of tension because of differences between the Board and the courts over the proper scope of judicial review in particular cases. Contributing to this tension is the fact that any single court of appeals can enforce its disagreement with the Board only within the geographical limits of its judicial circuit. The Board is free to try again in other circuits. The Board is also free to ask the Supreme Court to review the appellate courts, and the Board has had good success in persuading the Supreme Court to reverse appellate courts that have reversed the Board.

In recent months, the tension between the Board and several of the appellate courts has become pronounced, as reflected in the sharp statements of frustration that the courts have directed at the Board. Brief examples from three circuits will illustrate the range of this judicial exasperation.

N.L.R.B. v. Eastern Smelting and Refining Corp., [1] was decided by the First Circuit on May 14, 1979. The court began its opinion by remarking on "the fact that four cases involving a single principle on which this Circuit and the National Labor Relations Board have been in disagreement for over a decade, were heard in a single week." [2] The court went on to note:

> The Board's persistent disregard of the principles governing mixed motive cases ultimately led to our announcing that we would no longer 'rescue [it] if it does not both articulate and apply our rule.' ...Even this has not been fully effective. Instead, as the instant cases illustrate, the correctness of the approach seems to depend upon the choice of Administrative Law Judge.[3]

Yellow Cab Co. v. N.L.R.B., [4] was decided by the District of Columbia Circuit on October 20, 1978, and published with a supplemental opinion after the Board's petition for rehearing was denied on June 20, 1979. The court chastised the Board for having "repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations." [5] The court then told the Board:

> This process of ad hoc and inconsistent judgments -- in which the only determinative elements seems (sic) to be the composition of the NLRB panel which happens to hear the case -- has descended in the instant case almost to the point of absurdity.[6]

Allegheny General Hospital v. N.L.R.B., [7] was decided by the Third Circuit on November 7, 1979. The court described the Board as "an agency that declines to follow our precedent while conceding the applicability of that precedent." [8] The court then accused the Board of acting unlawfully. The court said:

> Congress has not given to the NLRB the power or authority to disagree, respectfully or otherwise, with decisions of this court. ...For the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law.[9]

These expressions of judicial frustration go beyond a disagreement with the Board on a question of

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[1] 598 F.2d 666.

[2] Id. at 669.

[3] Id. at 671-72.

[4] 603 F.2d 862, opinion on rehearing, 603 F.2d at 89.

[5] Id. at 869.

[7] ___ F.2d ___, 102 LRRM 2784.

[6] Id. at 869.

[8] Id. at 2785.

[9] Id. at 2788-89.

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law or policy. They reflect a feeling that the Board is not acting responsibly, that it is relying too much on the proposition that the courts should defer to the Board and too little on the principles of responsible decision-making that the courts view as the requisite for deference. If deference is a two-way street, and the courts are insisting that it is, then the sharpness of the recent tension calls for a closer look at whether the Board is doing its part.

This closer look will focus on court decisions reversing the Board since those decisions best show the limits of judicial deference. Such a focus is not meant to suggest that the courts have problems with most of the Board's decisions. Indeed, the Board continues to obtain full affirmance of most of its orders. However, the full affirmance rate has been declining recently, from 74.0% in 1976, to 68.1% in 1977, 64.8% in 1978, and 64.5% in 1979. In many of these reversals, the courts have criticized the Board for the inadequacy of its decisions, a criticism which has thus become a substantial factor in the decline of the Board's full affirmance rate.

The Board claims expertise in the construction of the law, in the determination of policy, in the application of law and policy to the complexities of industrial life, and in the reconciliation of the conflicting interests of labor and management. Our examination of the limits of judicial deference, and of the adequacy of the Board's decisions, will concentrate on these areas. The Board also claims expertise in questions of evidence and procedure, but these are not subjects exclusive to the Board, and we will comment on them only as they illustrate problems in other areas.

The standards developed by the Supreme Court to guide the Board and the appellate courts are not difficult to understand or apply. The Supreme Court has made it clear that "the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board," and that the Board's "special competence...is the justification for the deference accorded its determination."[10] However, in order for a Board decision to be entitled to deference, the Board must demonstrate that it "has reached a fair and reasoned balance upon a question within its special competence," and it must have "adequately explicated the basis of its interpretation" of federal law or policy.[11] In other words, the Board cannot use its "expert" status as a substitute for analysis. It must explain its position, and it must show that the result achieves a reasonable balance of the "conflicting interests of labor and management" in accordance with the stated objectives of Congress.[12] Moreover, the Board itself must meet this burden, rather than leaving the responsibility to counsel. As the Supreme Court has pointed out, the rationalizations of counsel in a reviewing court are no substitute for the Board's own explanations.[13]

Perhaps the most basic flaw identified by the courts in recent Board decisions is the failure of the Board to develop consistent principles of decision-making so that the reviewing courts can be assured that the Board is treating like cases alike. This is hardly a new criticism, but the courts are becoming increasingly intolerant of the Board's insistence upon simply referring to "all of the circumstances" to justify its conclusions. For example, in a bargaining order case last year, N.L.R.B v. Jamaica Towing, Inc.,[14] the Second Circuit "defer[red] to the Board's competence" on all of the violations the Board had found.[15] However, the court told the Board that the time had come for the Board to do more than recite the magic words from Gissel[16] to establish that the violations would preclude a fair election. The court stated that unless "the Board...explain[s] in each case just what it considers to have precluded a fair election and why, and in what respects the case differs from others where [the Board] has reached an opposite conclusion," the Second Circuit will not enforce the Board's bargaining orders.[17] The court then remanded the case to the Board to give it an opportunity to supply the required explanation.

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[10] N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 266(1975).

[11] Id. at 267.

[12] Id. at 267.

[13] N.L.R.B. v. Metropolitan Life Insurance Co., 380 U.S. 438, 442-44(1965).

[14] 602 F.2d 1100.

[15] Id. at 1103.

[16] N.L.R.B. v. Gissel Packing Co., 395 U.S. 575(1969).

Two years ago, the Third Circuit took an equally firm position - requiring a specific justification of the need for a bargaining order in each case[18]- but the Second Circuit's more recent decision in *Jamaica Towing* is evidence that the Board has not yet listened. These reviewing courts have not sought to impose upon the Board their own statement of principles to control the use of bargaining orders; rather, they have simply asked for a statement of the Board's principles. It is difficult to defend the Board's failure to honor such a request.

A closely related deficiency found by the courts in Board decisions is the Board's practice of changing its position without saying so, or worse, while denying the change. In such circumstances, the courts have understandably demanded an explanation. A good illustration is the D.C. Circuit's lecture to the Board on responsible decision-making in *Retail Clerks Local 455 v. N.L.R.B.*[19] several years ago. The court said:

> [W]e decide to remand the cause to the Board. If it wishes to overtly advance the position we suggest above, it should over-rule *White Front Stores* and *Smith's Management Corporation* and explicate why national labor policy requires that 'additional store clauses' be held illegal. But the Board may not attempt, as it has done here, to accomplish this result through a process of statutory construction which purports to uphold the legality of 'additional store clauses' while silently nullifying them.[20]

The D.C. Circuit delivered an even sterner lecture last year in *Yellow Cab Co. v. N.L.R.B.*.[21] The court began by noting that "the Board's treatment throughout the years of the distinction between 'employees' and 'independent contractors' in the area of vehicular and, especially cab leasing, has been marked by an unusual degree of confusion and vacillation."[22] The court further observed that the Board's "criteria for distinguishing between these two types of workers is based on an 'all of the circumstances' test."[23] The court then said:

> Given such a standard, one would expect a somewhat irregular, case-by-case approach to elaborating the controlling distinctions. The Board, however, has surpassed itself in clouding what need not have been an unusually confusing development of the law. Not only has the NLRB repeatedly reached diametrically opposite conclusions on the basis of virtually identical fact situations, ...but, moreover, it has done so in a series of opinions which typically offer no explanation for their result other than a recitation of the pertinent facts....[24]

The court concluded by telling the Board that "administrative agencies cannot function in that vacillating manner."[25] It is difficult to disagree with the court.[26]

In addition to being explained, the Board's result in a given case must also meet the test of reason and practicality. In a case decided last year, *Service Employees Local 250 v. N.L.R.B.*,[27] the D.C. Circuit rejected a Board decision because the result was inherently unreasonable. The Board had decided that an employer must allow all of its production employees to attend a Board pre-election hearing, even though their presence at the hearing was not required, unless the employer could show a substantial and legitimate business justification for ordering the employees to stay on the job beyond the obvious reason that the production line would have to shut down if all the employees attended the hearing. The court said, "we cannot sanction such a pronouncement even though we acknowledge the Board's expertise in the field."[28] Similarly unreasonable, and similarly unsuccessful, has been the Board's recent attempt to give an employee the right to have a union representative present when the employer simply tells the employee that he is discharged. The Ninth Circuit disagreed, in *N.L.R.B. v. Certified Grocers of California*,[29] because it saw no purpose to be served by the representation. The Board cited *Weingarten*[30] in support of its result, but the Supreme Court there expressly limited representation rights to meetings in which misconduct was being investigated. Indeed, that limitation had been proposed to the Supreme Court by the Board.[31] Within the last few weeks, the Board has thought better of its position in *Certified Grocers*, and has agreed with the Ninth Circuit.[32]

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[17] 602 F.2d at 1104, quoting from *N.L.R.B. v. General Stencils, Inc.*, 438 F.2d 894, 902(2d Cir. 1971).

[18] *Kenworth Trucks of Philadelphia, Inc. v. N.L.R.B.*, 580 F.2d 55, *opinion on rehearing*, 580 F.2d at 61 (1978). The Board established in *Kenworth* that the justification may be set forth either in the decision of the Administrative Law Judge, adopted by the Board, or in the decision of the Board itself.

[19] 510 F.2d 802(1975).

[20] *Id.* at 807.

[21] Note 4, *supra*.

[22] 603 F.2d at 869.

[23] *Id.* at 869.

[24] *Id.* at 869.

[25] *Id.* at 870, n.20.

[26] *See also K&K Construction Co. v. N.L.R.B.*, 592 F.2d 1228(3d Cir. 1979), in which the court reversed the Board for finding a picket line against a merged product to be a primary area standards line rather than a secondary consumer boycott line. The court found that the Board had called a consumer boycott by a different name in order to avoid Board and court precedent prohibiting the picketing of the product of a primary employer at the point of retail sale by a secondary employer where the product had been merged into the entire business of the retail employer.

The Supreme Court will decide this term whether consumer picketing against a product is an unlawful secondary boycott, as the Board and most appellate courts have contended, when the business of the retailer is almost totally dependent on the product being picketed. In *Retail Clerks Local 1001 v. N.L.R.B.*, 600 F.2d 280, the D.C. Circuit, in a 5-4 *en banc* decision, reversed a 3-2 Board decision reaffirming that such economic dependence makes the consumer picketing unlawful. The Supreme Court granted the Board's petition for certiorari, 48 U.S.L.W. 3435 (January 7, 1980).

[27] 600 F.2d 930.

Particularly irritating to a circuit court is a request to review or enforce a Board decision that has adamantly refused to comply with an earlier decision of the same court when the Board has not sought Supreme Court review of the earlier decision. The Board chooses its Supreme Court cases carefully, and it often looks for better facts or better reasons to support its position before presenting an issue to the Supreme Court. However, when the Board has lost three cases on the same issue in three circuits without petitioning for certiorari and then returns to one of them to demand that the court reverse itself to show proper deference to the Board's expertise, the court may be forgiven if it accuses the Board of operating "outside the law." Such is the recent history on the question of separate maintenance units in hospitals,[33] and such was the reaction of the Third Circuit in *Allegheny General Hospital*, referred to earlier in this discussion.[34]

The Board has continued to certify separate maintenance units in hospitals, rather than requiring combined service and maintenance units as requested by the hospitals, because that is the traditional Board position in other industries. The Board has adhered to its general rule despite the congressional admonition expressed during consideration of the health care amendments that the Board seek to minimize the number of bargaining units in hospitals in order to minimize the number of occasions for disruption of patient care through separate strikes.[35] The courts have invited the Board to explain why separate maintenance units are needed in hospitals despite the congressional concern, and the Board has refused, citing its "disagreement."[36] This rigidity is particularly unfortunate if the need for separate maintenance units can be explained. If it cannot, one must question whether the Board has wasted substantial administrative and judicial resources on the problem.[37]

Equally frustrating has been the First Circuit's recent inability to persuade the Board to respond to that court's interpretation of the proper standard to be applied in mixed motive discharge cases where the evidence suggests both legitimate and unlawful reasons for the firing of an employee. The First Circuit and the Board have disagreed for some years over whether the Board is empowered to find a violation of the labor law if the unlawful reason was not the dominant motive for the discharge. In 1976 the disagreement took on a new dimension when the Supreme Court decided in Mt. Healthy City Board of Education v. Doyle[38] that even where an employee's constitutional rights are involved, the exercise of those rights does not insulate an employee from termination for good cause.[39] In at least five opinions since 1976, the First Circuit has cited Mt. Healthy in support of its position.[40] The Ninth Circuit has also applied Mt. Healthy to a Board case.[41] However, the Board has yet to advise the appellate courts whether it considers itself bound by that Supreme Court decision. Meanwhile, the Board's disposition of mixed motive cases has become so erratic as to move the First Circuit to note, in the Eastern Smelting opinion quoted earlier,[41a] that the result seems to depend upon the views of the Administrative Law Judge who hears the case. Clearly, the Board's expertise does not entitle it to ignore a Supreme Court decision as compelling as Mt. Healthy appears to be.[42] If the Board considers Mt. Healthy to be inapplicable, it must say so, and say why, or it will lose the issue by default.

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[28] *Id.* at 926.

[29] 587 F.2d 449 (1978).

[30] Note 16, *supra*.

[31] 420 U.S. at 256-60.

[32] *Baton Rouge Water Works Co.*, 246 NLRB No. 161 (1979).

[33] See *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3d Cir. 1977); *N.L.R.B. v. West Suburban Hospital*, 570 F.2d 213 (7th Cir. 1978); *N.L.R.B. v. Mercy Hospital Association*, ___ F.2d ___, 102 LRRM 2259 (2d Cir. 1979).

[34] See the text at Note 9, *supra*.

[35] See the discussion of the congressional admonition in all of the cases cited in Note 33, *supra*.

[36] See the quotation from *Allegheny General Hospital* in the text at Note 9, *supra*.

[37] Such a dissipation of resources is not a recently-developed Board characteristic. In its rigid adherence to its so-called *Midwest Piping* doctrine, the Board has lost at least twelve cases in six circuits on the same point dating back to 1961 without either requesting Supreme Court review or reconsidering its position. See the cases collected in *Suburban Transit Corp. v. N.L.R.B.*, 499 F.2d 78 (3d Cir. 1974), and *Buck Knives, Inc. v. N.L.R.B.*, 549 F.2d 1319 (9th Cir. 1977).

Just as the Board's expertise does not permit it to ignore federal law in other areas,[43] so the Board's expertise does not permit it to ignore the private law of the parties to collective bargaining agreements. That private law consists of the agreements themselves and arbitration decisions rendered pursuant to authority delegated by the parties. If the meaning of a collective bargaining agreement is relevant to an issue before the Board, as it often is, the Board should attempt to effectuate the intention of the parties unless it finds that intention to be in violation of a national labor policy. A principle so basic would hardly seem to need discussion, except that the courts have had to remind the Board with some regularity that, in the words of the D.C. Circuit, "the Board's interpretation process in this case shows insufficient regard for the integrity of collective bargaining agreements, a most basic policy of the national labor law."[44] Incidentally, the appellate courts have held that the Board exercises no special expertise when it interprets a contract, and that the Board's contract interpretations are entitled to no particular deference on appellate review.[45]

If the Board has shown insufficient regard for the intention of the parties when it interprets collective bargaining agreements, it appears determined to disregard arbitration decisions almost entirely. In Suburban Motor Freight, Inc.,[46] decided on January 8, 1980, the Board announced that where an issue can be cast in both contractual and statutory terms, will no longer honor an arbitration award unless the issue is presented to the arbitrator and tried by him as a statutory violation. The result, of course, is to allow the grievant to present the issue, first to the arbitrator as a contract violation and then, if t resolution is unsatisfactory, to present the same issue to the Board as a statutory violation.

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[38] 429 U.S. 274.

[39] Id. at 285-86.

[40] Coletti's Furniture, Inc. v. N.L.R.B., 550 F.2d 1292(1977); N.L.R.B. v. Rich's of Plymouth, Inc., 578 F.2d 880(1978); Hubbard Regional Hospital v. N.L.R.B., 579 F.2d 1251(1978); Liberty Mutual Insurance Co. v. N.L.R.B., 592 F.2d 595(1979); N.L.R.B. v. Eastern Smelting and Refining Corp., 598 F.2d 666(1979).

[41] Western Exterminator Co. v. N.L.R.B., 565 F.2d 1114(1978).

[41a] See the text at Note 3, supra.

[42] The Supreme Court has recently reaffirmed Mt. Healthy. See Givhan v. Western Line Consolidated School District, ___U.S.___, 99 S.Ct. 693, 697 (1979).

[43] See Southern Steamship Co. v. N.L.R.B., 316 U.S. 31(1942). But see Sure-Tan, Inc., 246 NLRB No. 134 (1979), in which the Board held in a 3-2 split that it did not have an obligation to consider the effect upon federal immigration law and policy of its decision to order the reinstatement of illegal aliens. The Seventh Circuit may not agree with the Board. In N.L.R.B. v. Sure-Tan, Inc., 583 F.2d 335, 360(1978), that court enforced the Board's bargaining order in the case because it was "not inconsistent with federal immigration laws."

[44] Retail Clerks Local 455 v. N.L.R.B, 510 F.2d 802, 807 n.20 (1975). See also Retail Clerks Local 588 v. N.L.R.B., 565 F.2d 769 (D.C. Cir. 1977); District 1199C, Retail, Wholesale and Department Store Union v. N.L.R.B., ___F.2d___, 103 LRRM 2032 (D.C. Cir. 1979).

[45] Retail Clerks Local 455 v. N.L.R.B., 510 F.2d 802, 805 (D.C. Cir. 1975); N.L.R.B. v. Universal Services, Inc., 467 F.2d 579, 584 n.5 (5th Cir. 1972).

[46] 247 NLRB No. 2.

The Board issued Suburban Motor Freight shortly after being told by the Ninth Circuit in Servair, Inc. v. N.L.R.B.,47/ that such a position would be, in the words of the court, "the sort of evasion of arbitration deprecated by the Supreme Court."48/ The Ninth Circuit chastised the Board for concentrating too much on institutional formalism and too little on substance. It said:

> If an arbiter, with the agreement of the parties, resolves an issue completely, that decision should not be disregarded simply because the issue is capable of being perceived as a statutory question. Only when the arbiter has not resolved an ambiguous issue should that issue be capable of being raised anew before the Board as a statutory violation.49/

The Board must realize that it is not the only expert on the subject of employee rights, and it must show arbitrators and the arbitration process more of the same deference it expects for itself.

Unfortunately for the legal process, we have hardly exhausted the list of recent instances in which the Board has failed to engage in adequate decision-making. The courts are well aware of the importance of rational Board decisions to stable labor management relations, and for that reason, the courts will continue to insist, in each case, upon a demonstration that the Board has analyzed the problem and has applied its expertise in a sensible way. In such circumstances, honest differences will arise between the Board and the appellate courts, and these differences should be resolved by the Supreme Court. But inertia and reiterated claims for deference are not acceptable substitutes for Supreme Court review. The Board would do much to increase its effectiveness and would conserve precious administrative and judicial resources as well, if it would pay more attention to the well-considered views of appellate courts.

-- End of Text --

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47/ F.2d , 102 LRRM 2705(1979).

48/ Id. at 2709.

49/ Id. at 2709.

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SECTION

8-11-80 (No. 156) D - 1

REMARKS BY FORMER NLRB CHAIRMAN EDWARD B. MILLER AT AMERICAN BAR ASSOCIATION'S ANNUAL MEETING IN HONOLULU, AUGUST 5, 1980

(TEXT)

THE BOARD AT THE TURN OF THE DECADE */

How does the NLRB look for the 1980's? Well, to this former Chairman, now engaged in management representation, it does not look good. Before I start singing the blues, however, I should quickly point out that those of us who are engaged in the daily practice of labor law are, on most days, pretty remote from the doings of the members of the Board. Most of the decisions which affect our daily practice are made by the Regional Offices, which, while not perfect by any means, are by and large prompt, efficient, and conscientious. If our clients follow our advice, it's pretty rare that a complaint ever gets issued. And if it does, most of our cases are not precedent setting, new or novel. So we basically find ourselves in a setting where it is important that we prepare carefully, document our position, and hope we have witnesses whose credibility stands up on cross examination.

We know that well over 90% of the Board's decisions are unanimous and a very high percentage of them are routine affirmances of the decisions of the Administrative Law Judges. But it wouldn't be any fun to talk about those workday cases, and you would yawn, I know, if I just stood here and said kind things about the way most of the Board's Regional Offices are run and the creditable job that most of its trial judges do.

So let's look at a few of those thorny, difficult, precedent-setting cases.

You would be disappointed, and I would be out of character, if I did not say a few words in memory of the now deceased Collyer doctrine, and send a few flowers to the ailing, and failing, Spielberg doctrine. The death wound was inflicted on Collyer in General American Transportation Corp., 228 NLRB No. 102, back in 1977. At that time a bare majority indicated that 8(a)(5) cases still could be deferred to arbitration. Few of us had much hope that this would be a meaningful reservation. Subsequent cases have afforded ample ground for our skepticism.

In Native Textiles, for instance, 1/ the Board was presented with about as likely a candidate for Collyer deferral as one could think of. The issue was the non-earthshaking one of whether an employer could refuse to recognize an area representative of the Union who was no longer an employee of the Company. The Administrative Law Judge thought the case ought to be deferred to arbitration for an interpretation of the contract clause which said:

> "Employees of the Company constituting the Executive Board shall include a Vice President--Textiles and three (3) textile section area representatives."

Personally, I would have thought that contract clause could well have been interpreted by an arbitrator rather than decided by the Board at an average per-case cost of something over a thousand dollars. But the Board, knife in hand, aimed straight at Collyer's heart, found that this enormous issue could not be entrusted to an arbitrator--and I quote:

> ". . . but rather one which requires the Board to invoke its jurisdiction and exercise its expertise."

The Board then exercised this great expertise to find that the contract clause referring to employees of the Company constituting the Executive Board didn't really mean that the Executive Board had to be employees of the Company at all. You can see what's left of Collyer, but I still shed an occasional tear at his demise.

As I suggested, Spielberg is ailing, too, and hanging on for dear life.

So far Spielberg survives. In American Bakeries Co., Inc. 2/ two stewards were found by an arbitrator to have led a refusal to work overtime which the arbitrator found violated the no-strike clause and permitted disciplining the stewards. A majority of the Board honored the arbitration award. Member Jenkins dissented. His dissent, in my view, shows primarily what we have all known--that Member Jenkins is not hospitably inclined towards Spielberg.

Neither, of course, is Chairman Fanning. These two got together in Babcock & Wilcox 3/ and outnumbered Member Penello, who does believe in Spielberg. There an arbitrator had found, under the contract in issue, that the Union President had a duty to stop wildcat strikes, had failed to do so, and could be discharged. That award, said Fanning and Jenkins, was repugnant to the policies of the Act. The decision marks both a retreat from Spielberg and furtherance of the view held by Chairman Fanning and Member Jenkins that union stewards and officers don't really have any special duties with respect to wildcat strikes, even if an arbitrator finds that the contract says they do. That view is one of the most damaging blows to industrial relations which the current Board has foisted upon us.

In another Spielberg case, United States Postal Service 4/ an arbitrator's just cause for discharge finding was honored by a Board majority consisting of Members Murphy, Penello, and Truesdale. Chairman Fanning and Member Jenkins dissented on the ground that there was a Weingarten issue present which required the exercise of the Board's expertise. The arbitrator had found that the grievant had made no request for union representation, but Fanning and Jenkins stated that the arbitrator failed to state a basis for discrediting the grievant's testimony that she had made such a request. If, in order to satisfy Spielberg, an arbitrator must now include in his or her award a lengthy discussion of the basis for all credibility findings, Spielberg is nearing a fairly early demise. The majority put it rather bluntly in that United States Postal Service case. They said that Chairman Fanning and Member Jenkins were "seeking to undermine Spielberg and the arbitral process by needlessly substituting Board and court procedures for those traditionally used in arbitration." Only one more member sympathetic to the Fanning-Jenkins view is needed for that to become an accomplished fact.

In two cases--Suburban Motor Freight 5/ and General Warehouse Corp., 6/ a Board majority, over Member Penello's dissent, overruled Electronic Reproduction--which, in effect, means that if an arbitration award is to be given deference by the Board it must discuss and set forth a rationale with respect to the NLRA

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*/ Remarks at the American Bar Association Annual Meeting, Honolulu, Hawaii, August 5, 1980, Edward B. Miller, Managing Partner, Pope, Ballard, Shepard & Fowle, Chicago; former Chairman, NLRB.

1/ 246 NLRB No. 38.

2/ 249 NLRB No. 170 1980)

3/ 249 NLRB No. 99

4/ 241 NLRB No. 192

5/ 247 NLRB No. 2

6/ 247 NLRB No. 142

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issue involved. The net result of that is that any discharged employee can have a second bite at the apple if he is smart enough not to make an 8(a)(3) claim until after the just-cause award is in. Spielberg falters once more.

It is interesting that the Courts of Appeal for at least three circuits have now insisted that the Board follow Spielberg 7/ and reversed the Board when it failed to accord due deference to arbitration awards. I'm not going to discuss these decisions in detail. It was quite apparent during the life of Collyer that all of the courts welcomed the Board's deferral to the arbitral process. Collyer was approved in every circuit in which the issue was heard and was indirectly approved by the Supreme Court as well. The retreat by the Board from a healthy and hospitable respect and understanding for the insitution of arbitration is not finding favor in the judiciary.

If these cases mark as I think they do, an unwise intrusion by the Board into the settled and accepted procedures prevailing in the industrial relations community, it is as a fly bite compared with the current Board's naive and dangerous approach to wildcat strikes and to sympathy strikes as well. The industrial relations stability which this country has enjoyed as a result of the practice of the parties' entering into relatively long-term contracts during which strikes are not tolerated, is the envy of most countries in the Western world. As you well know, England has tried and failed to achieve the same kind of stability. While Chairman of the Board I attended a conference in Geneva attended by the Presidents of the Labor Courts of most of the Western world. All of those present regarded the problem of wildcat strikes as one of the most serious industrial relations problems and as one very difficult to keep within bounds through legislative and judicial action.

In this country, we have been fortunate in the very healthy respect which has or had been accorded to negotiated no-strike clauses. Wildcats occurred, but not very often. When they did, both unions and companies recognized that the union which had made the no-strike commitment had a real responsibility to see that it was honored. In our arbitral jurisprudence there had been established the principle that union officers and stewards had a special duty both to prevent wildcat strikes and to do everything in their power to terminate them once they occurred. If the union officers and stewards failed in that duty, it was understood that an employer had the right to discipline those officers and stewards up to and including discharge.

In Precision Castings 8/ and in Gould, 9/ the Board threatened this doctrine by holding that union officers and stewards do not have any such special duty and that they can be disciplined no more than any other employee who participates in a wildcat. That was a sad day for the industrial relations community. So far that line of cases has not received any court support, and has been specifically rejected by the 7th Circuit in Indiana and Michigan Electric Co. v. NLRB, 10/ and by the 3rd Circuit in Gould Inc. v. NLRB. 11/

Undismayed by this lack of judicial support, the Board goes on its irresponsible way, retreating only when it is shown that a union officer or steward actually urged or instigated the illegal strike or slowdown. 12/ Even when the facts showed that union officers and stewards had not been disciplined any more severely than others who were equally active in fomenting and participating in the wildcat, Chairman Fanning and Member Jenkins would have found a violation of the Act where the employer's language in discharging the steward said, "Discharged as a steward actively engaged in a strike." Fortunately for justice and fortunately for our client in that case, 13/ Members Fanning and Jenkins were in a dissenting minority.

Speaking of strikes, some of us used to believe that a flat no-strike clause prohibiting all strikes meant what it said. The Board has since come along and held that if you want that kind of a clause effectively to prohibit a sympathy strike, it must say so in terms, or at least you must have a very strong bargaining history indicating specific discussion and agreement about sympathy strikes. And while the Board has permitted a broad clause to apply to a sympathy strike where there was adequate bargaining history, 14/ the Board has been its usual unrealistic self in evaluating bargaining histories. In Chevron USA, Inc. 15/ for example, there was a broad, seemingly all inclusive, no-strike clause. The union in the course of bargaining had proposed, but the employer had refused to agree to an exception permitting employees to honor a picket line established by other unions representing Chevron employees. The history also showed that at one time there had been a threat of 301 suit by the employer when the union had respected a picket line of another union. When the employer had threatened suit, the union had backed off and ordered the employees back to work. Nevertheless, the Board found that the no-strike clause wasn't meant to apply to sympathy strikes. All of that history meant nothing to a majority of the Board, although it did both to the Administrative Law Judge and to dissenting Member Penello.

It seems rather strange to see the Board drifting down this path of being so sympathetic to sympathy strikers. With the enactment of the Taft-Hartley Act, I though we had a pretty clear Congressional expression of intent favoring the restriction of strike activities to the locale of the primary dispute. Why, then, as a policy matter, the Board seems to go out of its way to read into no-strike clauses an implied exception for sympathy strikes I find it hard to fathom. A no-strike clause, it seems to me, ought to be construed to mean what it says. There ought to be some compelling policy consideration for reading an exception into it. But that is plainly not the view of a majority of the current Board.

But then, the majority of the current board seems to be willing to dilute the Act's protection against secondary activity in general. The broad scope given to the publicity proviso in the United Steelworkers (Pet Foods) case 16/, and its near reversal of the Hearst doctrine in Teamster Local 560 (Curtin Matheson Scientific, Inc., 248 NLRB No. 156), both suggest that the present Board is going to be willing to apply more stringent tests of who or what is a neutral than former decisional rules would have suggested.

In its enthusiasm for some of its newer doctrines, the Board has been running afoul of the courts of appeal with greater frequency, as John Irving pointed out in his swan song a few months ago. It sometimes seems almost to be inviting court disapproval. I find it astounding, for example, that the Board recently flaunted the Supreme Court's decision in Nathanson v. NLRB, 344 U.S. 25 where several decades ago the Supreme Court held that a Board claim for back pay is simply a wage claim entitled to no more nor less priority than any other wage claim. Employees with wage claims have no right

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7/ NLRB v. Wilson Freight Co., 604 F.2d 712 (1st Cir., 1979); District 1199E, Nat. U. of Hospital v. NLRB 613 F.2d 1102 (D.C. Cir. 1979); Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir., 1979).

8/ [illegible] NLRB No. [illegible] (1977)

9/ [illegible] NLRB No. 124

10/ [illegible] F.2d 227, (7th Cir., 1979); cert. den. 103 LRRM 2143.

11/ 612 F.2d 728 (3rd Cir., 1980)

12/ International Wire Products Company, 248 NLRB No. 146; Midwest Precision Castings, 244 NLRB No. 63.

13/ Rogate Industries, 246 NLRB No. 143

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13/ Rogate Industries, 246 NLRB No. 143

14/ American Cynamid, 246 NLRB No. 19.

15/ 244 NLRB No. 160.

16/ 244 NLRB No. 6.

to follow assets which are sold under a bankruptcy court free-and-clear sale. Such wage claimants take whatever priority they have in connection with the pool of money that is obtained in the course of the sale. Yet the Board has recently said it would issue complaint against a free-and-clear purchaser and seek to follow the assets by attempting to recover back pay from the purchasers! Well, the Board may get away with its lack of respect for the arbitral forum, but I suspect the judiciary may require it to recognize the proper jurisdiction and function of the bankruptcy courts.

If the Board gets a spanking from the court of appeals in that case, it won't be its first in recent years. A goodly number of spankings have been administered in those cases in which the Board is called upon to make a determination as to whether certain persons--particularly truck drivers--are employees or independent contractors. I spoke about this subject at some length at the ABA National Institute in Washington, D.C., last year, and I won't repeat that speech here. But the problems which I mentioned there continue.

Despite the stern lecture to the Board by the Court of Appeals for the District of Columbia in a Yellow Cab case, 603 F.2d 862 (D.C. Cir. 1978), the Board has recently invited a similar spanking by the same court, by again finding similarly situated owner-operators of cabs at Dulles airport - right in the D.C. Court's own backyard - to be employees. Air Transit, Inc., 248 NLRB No. 140. I suspect the D.C. Court will administer another licking to the Board in that case. And sooner or later, one of these cases will probably get to the Supreme Court.

When it does, there may be still more trouble for the Board because the Board, in my opinion, continues to ignore the law as laid down by the Supreme Court. For example, in Mitchell Bros. Truck Lines 17/, the Board rather frankly concludes that the nature of federal regulation of trucking is such that it virtually requires every transportation company to be an employer, thus apparently almost eliminating the possibility of independent contracting in the trucking industry. The difficulty with that line of reasoning is that the Supreme Court, in two companion cases issued some years ago -- United States v. Silk and Collector of Internal Revenue v. Greyvan Lines 18/ found truck owner-operators to be independent contractors under the common law test, even though they were subject to all the controls necessitated by admittedly extensive federal regulation in this field.

But more significantly, in both the taxicab cases and in these over-the-road trucking cases, the Board needs very badly to lay down some tests and guidelines which are understandable and which can be applied. That, of course, is what the D.C. Circuit was talking about in Yellow Cab. The Board needs--and needs badly--to develop a set of guidelines and criteria in this area for the guidance of the parties and for the sake of its own credibility with the courts. The Internal Revenue Service, which follows the same common law test, laid down such guidelines years ago. It is high time the Board followed suit.

A somewhat similar failure to do a careful analytical job and to establish criteria for its decisions lies at the heart of the Board's difficulties in its amendment-to-certification cases, where its decisions are being upset by the courts of appeal with some frequency.

The courts of appeal are increasingly unwilling to swallow the notion that the Steelworkers or the Auto Workers or the Oil, Chemical and Atomic Workers are really the same [illegible] courts are insisting [illegible] assertions and instead carefully analyze whether, indeed, the alleged successor union is the same union in the sense that the employee and employer rights with respect to the affiliated union are essentially unchanged from those in being when the independent was in full flower. American Bridge (457 F.2d 660, 3rd Cir. 1972) and Glockler (540 F.2d 197, 3rd Cir. 1976) were the lead cases in the Third Circuit. Recently, in Amoco Products Co. v. NLRB, the Fifth Circuit also refused to accept the Board's doctrinaire ruling that such affiliations are simply internal union matters and the doctrinaire assumption that an affiliated union is the same union as a previously unaffiliated union. The Fifth Circuit remanded, demanding a genuine factual analysis. I wrote an amicus brief in that case and also one out in the Ninth Circuit involving Seattle National Bank. After the Amoco decision came down, the Board asked the Ninth Circuit to remand the Seattle case to it for further consideration, which that Court has now done.

Thus both the Amoco case and the Seattle case are back at the Board, and the Board will have an opportunity to reexamine its approach to this problem. I know that the temptation will be strong for the Board simply to dress up its prose and try to make a respectable argument for the results it had previously reached in both these cases. I hope the Board does not yield to that temptation and does a really careful, analytical, and lawyer-like job, giving this whole problem area an honest reappraisal. This may be too much to hope for. But if that does not occur, then my hunch is that the Board will continue to take more lickings in the courts of appeal, and eventually one of these cases, too, will get to the Supreme Court.

Well, there are always, I suppose, lines of Board decisions with which some of us disagree, and the courts have had to set the Board straight before. I think, however, there are broader concerns. The Board's existence is justifiable, in my view, only if it truly has expertise in a field which is of vital importance in our economy--that of industrial relations. It gets increasingly difficult to justify the Board's existence on that basis. There is very little practical industrial relations experience to be found anywhere in the biographies of any of the present Board members or of the top staff of the General Counsel's side of the agency. That is a serious shortcoming.

It could be compensated for by expertise in law. But as we have seen, the courts of appeal are becoming more and more critical of the Board's legal analysis. That is understandable, because when the Board is called upon to handle a caseload as big as this Board tries to handle, there's no way that any very significant amount of time can be spent by any Board member on any given case. There is too much to do. Inexperienced staff members who have even less practical experience and substantially less knowledge of the law than the Board members have to play too big a role in helping the Board manage that caseload. That situation isn't getting any better, and there is no reason to believe that it will in this decade.

One of these days this Labor Law Section of this Association ought to attempt seriously to deal with that problem and to make constructive recommendations about a restructure of the administrative and judicial mechanisms for administering the National Labor Relations Act.

That is very hard to do. There are many private axes to grind. In some sense all of us have a stake in the status quo, because we know how to deal with it. And I know we have difficulty in arriving at a consensus among our union and management lawyers.

But one of these days Congress [illegible] to the fact that the theory that [illegible] in Washington with a wealth of practical experience and legal expertise are making the key decisions in administering the Act has become pretty much a fiction--not for want of honest effort by five good people at 1717 Pennsylvania Avenue, but rather because of factors beyond the control of the Board members. Although the agency somehow

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17/ Air Transit, Inc., 248 NLRB No. 140

18/ 249 NLRB No. 51

copes with the load which has been thrust upon it, it long ago became incapable of providing that high degree of practical experience, painstakingly careful interpretation and application of the law which was envisioned by those whose dreams and hopes inspired the original Wagner Act and the significant 1947 and 1959 Amendments thereto.

Our usual apathy and the all too normal willingness of the bar to live with the status quo has meant that no real initiatives for significant reform in the structure for administering the Act has ever come from this Association. I can well understand why we did not wish to become significantly involved in the highly partisan proposals which were offered under the banner of labor law reform a year or two ago. But is it not still possible for us to take an initiative in a cooperative rather than a partisan spirit?

Every one of us who practices before this agency, management lawyer or union lawyer, knows that the institution has not lived up to its promise. When will we have the courage, the energy, the dedication, and the creativity to bring forth recommendations for something better, instead of complainingly and begrudgingly tolerating the anachronism that the Board has become?

That would be a new direction for which posterity would truly be grateful.

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WASHINGTON REPORT
ON LABOR

Analysis

NLRB rulings show tilt toward labor union goals

Editor's Note: *This is the first of two articles analyzing the emerging pro-union trend of rulings handed down by the five-member National Labor Relations Board. The second will appear in an upcoming edition of "Washington Report on Labor."*

Union leaders may be winning victories in the federal bureaucracy that are eluding them on Capitol Hill.

Recent rulings by the National Labor Relations Board, an independent administrative agency charged with ironing out disputes under the National Labor Relations Act, show a tilt toward union goals. If the trend continues, the expected fight in the next Congress over labor law "reform" legislation may be unnecessary.

Despite legislative setbacks—common situs picketing and labor law "reform" legislation died in the last Congress—construction unions have gained a sharp edge in recent NLRB decisions.

In cases including *Los Angeles Building Trades Council (Donald Schriver, Inc.)* and *Topaz Contracting & Development Co., Inc.* as well as *Woelke & Romero Framing, Inc.*, the NLRB sanctioned what amounts to "top-down organizing" by permitting a union to direct a contractor, who subcontracts work, to use only those firms which have signed collective bargaining agreements with craft unions.

A union may picket, under the rulings, in support of restrictive subcontracting practices which force non-union ("open shop") subcontractors from being hired. This eases union organizing by effectively forcing an employer to hire only unionized subcontractors.

Appeals are expected in these NLRB rulings—rulings which limit the application of the Supreme Court's landmark decision in *Connell Construction Co. vs. Plumbers Local 100.*

"WHO CARES ABOUT THE ONE THAT GOT AWAY?!..."

The justices ruled in the *Connell* case that construction unions seeking to restrict an employer's subcontracting to non-union employers violated federal antitrust laws.

In its "narrow" interpretation of *Connell*, the NLRB decided that in the context of a collective bargaining agreement (*Woelke & Romero Framing*), and possibly without such a relationship (*Schriver* and *Topaz*), a union may insist that an employer subcontract only with union firms.

In *Teamsters Local 83 (Allied Concrete)*, an earlier case, the NLRB upheld the actions of strikers who followed a non-union employer's cement truck onto a job site, triggering employees of a "neutral" employer to walk off the job. This decision eased the sting of the defeat of the common situs picketing bill. The legislation would have authorized a single union to picket, shutting down an entire construction site, even though its primary dispute was with only one employer on the job site.

Laws on the statute books permit unions to picket at a "reserved gate" an employer with whom they have a dispute. This allows unions to demonstrate a dispute with a single employer, without stopping "neutral" employers from continuing work on the construction project through an illegal "secondary" boycott.

Expanding union rights

In *Allied Concrete*, however, the NLRB expanded the rights of construction unions to picket not only at a "reserved gate," but to follow the employer through that gate and onto the project. The *Allied Concrete* ruling not only draws "neutral" employees into a dispute, it also fosters union organizing by encouraging the hiring of union labor.

Recent NLRB rulings affecting other industries will be analyzed in another issue of *Washington Report on Labor*.

Part II: NLRB trends

Labor unions rack up big victories

Uncertainty created in labor-management relations

Editor's Note: *This is the second article analyzing the pro-union trend in rulings handed down by the five-member National Labor Relations Board (NLRB). The first appeared in the Dec. 11, 1978 issue of "Washington Report on Labor."*

One of the rallying cries in the 95th Congress in support of the union-inspired labor law "reform" bill was to "streamline" the procedures of the National Labor Relations Board (NLRB).

Pointing to the steadily increasing caseload of the NLRB—the independent administrative agency charged with ironing out disputes under the National Labor Relations Act—union officials claimed the so-called "reform" legislation was merely designed to make the agency more efficient.

That myth was destroyed when a report issued by the NLRB's general counsel predicted the bill would increase, rather than reduce, the agency's caseload. The report estimated the bill would substantially increase time-consuming litigation, resulting in a costly boost in the NLRB's budget and staff.

'... litigation for litigation's sake ...'

The agency, for example, is a major contributor to its workload problems. Recent NLRB decisions show that in part, the agency's expanding caseload results from its own bureaucratic tendency, requiring parties to litigate trivial matters better left to collective bargaining, arbitration, and grievance procedures.

In the process, the agency often has demonstrated a disregard for workplace realities.

In a 1978 case (*Clear Haven Nursing Home*), the NLRB rejected a voluntary settlement between an employer and union, ignoring an overwhelming 60-14 vote by the affected workers to approve the pact.

The parties had agreed to sign a collective bargaining agreement which would have ended a long strike at a nursing home in Clearfield, Pa.

The settlement included an agreement to reinstate all striking workers and to pay wage rates which thereafter would have compensated those workers for wages lost during the strike.

The NLRB's disapproval of the settlement now forces the employer and union to litigate unfair labor practice charges before the agency, and ultimately the courts—actions which will take many months to resolve.

The NLRB's final decision could be to order the parties to bargain in good faith with the object of negotiating a collective bargaining contract—precisely what had been voluntarily achieved by the parties before the NLRB's intervention.

The dissenting member stated the case is a "public announcement that the board wants litigation for litigation's sake and that even settlement of a case by the execution of a collective bargaining agreement is an inadequate substitute for litigation."

In another recent decision (*Texaco, Inc.*), the NLRB backed away from its long-standing policy that labor-management disputes should be resolved where possible through grievance and arbitration procedures negotiated by the parties themselves.

The NLRB refused in this instance to accept an arbitrator's decision that an employer was entitled to make minor changes in work schedules because of a shift to daylight saving time, after first discussing such changes with the union as provided by a collective bargaining agreement. By refusing to defer to arbitration, the NLRB delayed resolution of the issue for over three and one-half years. More importantly, the agency's action ignored the procedure voluntarily agreed upon by the parties to resolve such disputes.

These cases are among a growing number handed by the NLRB dealing

Current members of the National Labor Relations Board are (from left to right): Howard Jenkins Jr., Betty Southard Murphy, John H. Fanning (chairman), John A. Penello, and John C. Truesdale.

(Continued on page 5)

Labor Relations Board trends

(Continued from page 4)

with trivial issues, preferring federal intervention to other more suitable alternatives.

Equally disturbing is the emerging pro-union drift of NLRB rulings, a trend which could lead to the adoption of many of the unions' goals in the so-called labor law "reform" bill.

For example, some NLRB decisions actually appear designed to accomplish the primary intent of the bill—to help unions organize employees in non-union firms.

In a recent case (*K&K Construction Co.*), in order to publicize a dispute with K&K—a non-union subcontractor—a union picketed the main sales office of the general contractor, which was located in a shopping center, as well as putting pickets up at the housing site. The picketing occurred only on weekends, when most customers shop for homes.

Although a NLRB majority decided the picketing to publicize area wage standards was lawful, a federal court later ruled weekend picketing at the main entrance of the housing project and at the sales office was aimed at hindering the sale of homes, with the illegal objective of having the general contractor ("secondary" employer) terminate its relationship with K&K, the "primary" employer.

> ... 'Flip-flops' by new NLRB majority reverse long-standing rulings ...

In reversing the decision, the court alluded to the NLRB's recent pro-union trend, noting that in earlier cases the agency had "consistently interpreted" similar situations as a secondary boycott, but that "in this case the board had shifted its stance."

Another case (*Earringhouse Imports*) involved a group of workers who were fired for unauthorized work absences to watch NLRB hearings. The workers were not involved in the hearing and had been denied permission to attend during working hours. As a result of their absences from work, production was disrupted. The NLRB's decision to reinstate the workers—with the award of backpay—will undermine the employer's ability to maintain workplace discipline and efficient production.

In another case (*Hubbard Regional Hospital*), four nurses prepared a sedated patient for surgery—the husband of a nurse supervisor—and covered him with a disposable yellow gown on which were the words "Yellow Bird Express." The nurses rolled the patient through the hospital's halls to the operating room. The hospital administrator subsequently fired the four nurses for "humiliating" the patient.

The NLRB, ruling that the four nurses had been involved in attempts to form a union at the hospital, ordered their reinstatement with backpay, claiming the nurses would not have been discharged but for their union activities.

In yet another case (*Advance Industries*), a group of workers refused to leave a plant after the scheduled closing time to protest a change in working hours. The workers, who were eventually arrested and forcibly removed, engaged in what amounted to a "plant takeover." Ignoring the employer's rights to maintain control over the use of equipment and the hours of plant operation, the NLRB ordered the workers rehired with backpay.

In the *Mueller Brass* case, the agency ordered the rehiring with backpay of a male worker—a union shop steward—who had been fired for lewd conduct and harassment of a female co-worker.

Finally, in two cases (*Precision Casting Co. and Gould Inc.*), involving the suspension or discharge of union shop stewards who participated in wildcat strikes in violation of no-strike clauses in their collective bargaining contracts, the NLRB ordered the employees rehired with backpay.

Despite the widely recognized principle that shop stewards have the contractual responsibility to adhere to provisions of a collective bargaining agreement, and instruct each employee to do so as well, the NLRB decided an employer may not suspend or fire union stewards who fail to fulfill these responsibilities by engaging in unauthorized, illegal work stoppages.

These emerging pro-union decisions by the NLRB do little to stabilize industrial relations or instill confidence in the collective bargaining process. And recent "flip-flops" by the board's new majority—whose decisions are reversing, step-by-step, previous long-standing rulings—create uncertainty in labor-management relations. Based on this trend, union officials are probably wondering whether their unsuccessful fight for labor law "reform" legislation was really necessary.

Washington Report—February 5, 1979

2 Washington Report August 13, 1979

Rulings in Seattle Bank Cases Reveal NLRB Tilt to Unions

By William Kroger

Two recent decisions by the National Labor Relations Board in cases involving a Seattle bank hold major significance for the financial community and business in general.

One decision involves a union organizing drive and the other the rights of the owner of a building in relation to a dispute between a union and a tenant in that building.

The organizing drive involved the bank itself, Seattle First National, known as Seafirst.

NLRB policy from August 1977 to January of this year had held that, in any collective bargaining election, union affiliation required the approval of a majority of all persons in the designated bargaining unit.

When the vote is on the question of changing union affiliation, the board now says, only those workers who are already union members need vote, and a majority of those members is sufficient to determine the outcome.

That change in eligibility to vote can be crucial, as the Seafirst case shows.

The 22nd largest bank in the U.S., Seafirst has been organized for years, making it unique among major banks in America. Seafirst also is located in Washington state, which has a highly organized work force—about 35 percent, according to the Bureau of Labor Statistics.

Because of these two factors—the bank's being organized and located in Washington—Patrick M. Fahey, a Seafirst vice president, says he believes the bank is a logical target for a big union to gain a foothold into the largely unorganized banking community nationwide.

Affiliation Effort Begins

Since organizing in 1938, the union local at Seafirst has been independent most of the time.

In 1977, the contract between the independent local union and Seafirst management expired.

"Management was trying to kill the local, and it was our belief that to preserve the union, affiliation was necessary," says Nancy J. Holland, president of Local 1182 of the United Food and Commercial Workers (UFCW) union.

She referred to an affiliation move last year by the retail clerks union, which merged this summer with the meat cutters union to become the 1.3-million member UFCW, now the largest member of the AFL-CIO.

Whether the UFCW represents Seafirst employees now or not seems to be debatable. The local independent members' vote to affiliate with the UFCW was based on the NLRB stance that only union members need approve a change in union affiliation.

But Seafirst management disagrees and cites the earlier NLRB policy that a majority of all members of a bargaining unit must approve an affiliation.

Here is how the vote actually took place: The number of people in the designated Seafirst bargaining unit at the time of the affiliation vote was 4,790. But ballots were issued to members of the independent union local, who comprise only about half of the employees. And only about half of them voted to affiliate. This means that under NLRB policy, just about one fourth of all employees in the bargaining unit could carry the vote to affiliate with the giant UFCW. Seafirst management did not recognize the union.

Union Emerged Victorious

An April ruling by the NLRB, however, sided with the UFCW. Now, following a suit by Seafirst, the matter rests with the federal Court of Appeals in San Francisco. An NLRB spokesman says he does not expect a decision from the court until after the first of the year, and probably not until the fall of 1980.

Holland, president of the Seattle UFCW local, says criticism that her union is trying to gain a foothold into the financial community "is quite incorrect. Our present concern involves Seafirst," she says.

Organizing Others Possible

But what about later, especially if the lawsuit decision is favorable for the union? The union might "possibly" try to organize other Washington banks, she says.

The second major decision by the NLRB, issued this month, involves landlord rights in a union dispute with a tenant.

Seafirst owns a large building in Seattle, and one of its tenants on an upper floor is a restaurant whose employees are organized. Subsequent to the expiration of a contract between the employees and the restaurant, union members began passing out handbills to potential patrons. This took place, in part, in an area adjacent to the entrance to the restaurant. But the area also happens to be a common hallway that is used by patrons of other Seafirst tenants.

Seafirst threatened the union members with arrest for trespassing, but the NLRB ruled that such action would be an unfair labor practice. The labor board said the union has a right to communicate its message, including passing out handbills in the common hallway.

THE BUSINESS ADVOCATE NEWSPAPER PUBLISHED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES

Washington Report

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Rulings Tilt To Labor

Recent rulings by the National Labor Relations Board reveal an antibusiness, prounion slant, according to critics of the five-member tribunal charged with conducting union representation elections and remedying unfair labor practices.

It appears that this trend is being stemmed in federal appeals courts where certain NLRB decisions have been overturned. There are signs of dissatisfaction among some federal judges with the board's attempts to fashion new labor law—a power reserved to Congress—as well as the board's efforts to preempt the courts.

See NLRB—page 9

Prounion Rulings Stemmed in Courts

NLRB—from page 1

In the K & K Construction Co. case, the NLRB decided that union picketing targeted at a builder was lawful, despite the fact that it was done at a construction site and sales office of a developer not the object of the dispute. Picket lines were thrown up on weekends when construction workers were off the job, but when the developer was seeing a large number of customers.

The NLRB said that the picketing was not an attempt to coerce the developer into pressuring the builder to agree to the picketers' demands.

Board member John Penello dissented, accusing the board of ". . .amend(ing) the secondary boycott provisions of the National Labor Relations Act by mere administrative adjudication."

Court Endorsed Change

On review, a U.S. appeals court endorsed Penello's charge, ruling that the picketing had the unlawful object of forcing the developer—a secondary party—to end his relationship with the builder.

Protections from secondary boycotts are designed to prevent employers, consumers, and employees from becoming victims of labor disputes in which they have no impact or control.

In 1976, the NLRB decided in the Safeco Title Insurance Co. case that picketing of five neutral insurance companies that derived 90 percent to 95 percent of their revenues from sales of insurance policies underwritten by the primary employer, was an unlawful secondary consumer boycott. As in an earlier case involving Dow Chemical, the board reasoned that the neutral party had the choice of ending its relationship, with the primary employer being forced out of business.

Cases Could Be Reversed

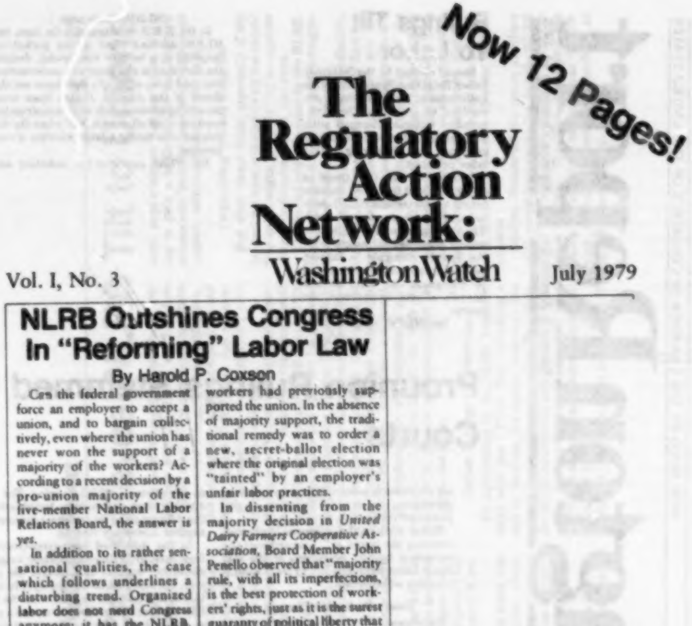
In the Safeco and Dow cases, dissents were registered by two board members, who are now joined by John Truesdale and make up a majority bloc on the NLRB. Furthermore, by withdrawing its petition to the Supreme Court, the board could prevent the issue from being definitely resolved. This new majority, aided by conflicting appeals court decisions, could reverse the Safeco and Dow rulings when a decision is handed down in the Carvel Ice Cream case.

The Carvel case involves union picketing of independent ice cream franchisees—neutral parties—whose sales are predominantly the products of Carvel, the primary employer, with whom the union had a labor dispute. A reversal of the secondary consumer boycott principle would continue the prounion trend at the NLRB.

In another case, Earringhouse Imports, the NLRB ruled in 1977 that an employer could not discipline 13 workers who left work—although denied permission to do so—to attend a NLRB hearing. The U.S. appeals court reversed the board, criticizing it for ignoring its own precedents which support a contrary finding.

In the Advanced Industries-Overhead Door case, involving an employer's right to discipline workers and control his property, the board found an employer in violation of the Taft-Hartley Act when he fired five workers who refused to vacate a plant at closing time. The workers, protesting a change in working hours, were arrested and escorted from the plant by police.

Although this constituted a forcible takeover of the business' property, the board chose to find the employer's actions to be a "protected activity" not subject to discipline. An appeals court refused to enforce the board's order reinstating the discharged workers.



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The Regulatory Action Network:

Washington Watch

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July 1979

NLRB Outshines Congress In "Reforming" Labor Law

By Harold P. Coxson

Can the federal government force an employer to accept a union, and to bargain collectively, even where the union has never won the support of a majority of the workers? According to a recent decision by a pro-union majority of the five-member National Labor Relations Board, the answer is yes.

In addition to its rather sensational qualities, the case which follows underlines a disturbing trend. Organized labor does not need Congress anymore; it has the NLRB. While the American public managed to get the message to its elected representatives on Capitol Hill not to pass "labor law reform" legislation last Congress, an unelected majority of a five-person board has fulfilled the dreams of pro-labor legislators by "making law" through NLRB rulings.

No Majority? Bargain Anyway

United Dairy Farmers Cooperative Association is the case which has left more than a few mouths hanging open. On June 12, 1979, the NLRB ruled that where an employer commits "flagrant" and "pervasive" unfair labor practices during a union organizing campaign, the NLRB may order the employer to bargain with the union even though it never gained the support of a majority of the workers. In the past, the Board imposed bargaining orders as an extreme remedy only where it was found that a majority of workers had previously supported the union. In the absence of majority support, the traditional remedy was to order a new, secret-ballot election where the original election was "tainted" by an employer's unfair labor practices.

In dissenting from the majority decision in *United Dairy Farmers Cooperative Association*, Board Member John Penello observed that "majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered." Noting that his colleagues had *failed to provide any standards for determining when the extreme remedy would be used*, Penello predicted that the Board's "new policy" is "fraught with danger for the unconsenting majority of employees in future proceedings."

The *United Dairy* case is merely the latest in a series of pro-union rulings by the NLRB—the federal agency responsible for administering the National Labor Relations Act—which appear to be calculated to give the unions what they were unable to accomplish in Congress through the so-called Labor Law Reform Act. The union-inspired bill, which was defeated in the 95th Congress when its supporters failed to break a Senate filibuster, would have permitted the government to debar an employer from receiving government

(Continued page 7)

Chamber of Commerce of the United States

NLRB Rulings
Continued

contracts as a penalty for "flagrant" and "repeated" unfair labor practices. Yet even that bill did not propose the extreme remedy announced by the NLRB in the *United Dairy* case.

More Pro-Labor Rulings

The unions scored another victory with the NLRB on an issue they also failed to win last Congress. In *Teamsters Local 83 (Allied Concrete)*, the NLRB upheld the actions of strikers who followed a non-union employer's cement truck onto a job site, triggering employees of a "neutral" employer to walk off the job.

That decision eased the sting of the unions' defeat on the common situs picketing bill, which would have authorized a single union to picket and shut down an entire construction site, even though its primary dispute was with only one employer on the job site. By drawing "neutral" employers into a dispute, of course, the unions' objective is to foster "top down" union organizing by encouraging the hiring of union labor.

Another disturbing trend in NLRB decisions involves the extent to which the agency has expanded the concept of protected "concerted activity". For example, the NLRB ordered the reinstatement with backpay of several workers who were discharged for unauthorized work absences to attend NLRB hearings *(Earringhouse Imports)*, and union stewards who were discharged or disciplined for participating in wildcat strikes in violation of no-strike clauses in their collective bargaining contracts *(Precision Casting Co., and Gould, Inc.)*.

It also appears that the NLRB is attempting to expand its jurisdiction into other fields including equal employment opportunity. In two landmark cases (*Westinghouse Electric Corp.*, and *East Dayton Tool and Die, Co.*), the NLRB ordered that the employers supply the unions with confidential data about their hiring practices, applicants, employers, and EEO status. This data consisted of the same information which employers are required to file with the Equal Employment Opportunity Commission, but which that agency is prevented, by law, from disclosing.

"Straining at Gnats"

Another NLRB trend has stirred up the courts as well as the business community. Whether it is called "flip-flopping" in Potomac River jargon or a "vacillating record," in the words of a U.S. circuit court judge, the current NLRB majority has begun to reverse some long-standing rulings in a manner which has brought charges of inconsistency.

Judge MacKinnon of the U.S. Court of Appeals for the District of Columbia addresses this problem rather poignantly in response to a June 20, 1979, petition from the NLRB. The Board had asked the court for a rehearing of its 1978 refusal to enforce NLRB orders against Yellow Cab Company and Checker Taxi Company of Chicago.

The controversy was over whether the taxi drivers were considered "employees" of the taxi companies with regard to the cab leasing arrangement, or whether they were "independent contractors," outside coverage of the Taft-Hartley Act.

Harold P. Coxson, Jr., Director of Labor Law, is the National Chamber's expert on the National Labor Relations Board.

The U.S. Court of Appeals said "no" once again to the "employee" status of taxi drivers, and said that the Board's analysis was simply "straining at gnats" to find support for its current conclusion that they are. Judge MacKinnon explained the court's lack of usual deference to agency expertise, saying, ". . . we are not in any legal doubt that when an agency on a particular legal issue, without giving any *reasoned* decision for changing, arrives at three different interpretations within a few years, where there has not been any demonstrated change in decisional law, statute or circumstances to justify changing the law, then a court is justified in examining more closely the basis for the unexplained shift in the Board's decisions."

At least there is assurance in knowing that some courts will require consistency from a powerful administrative lawmaker going through growing pains.

Regulatory Action

NLRB is not your ordinary "regulator." As NLRB Chairman John Fanning recently told a group of business executives at a National Chamber program, "In 44 years, the NLRB has published a grand total of 4 rules, two of which establish monetary standards for the assertion of jurisdiction over universities and symphony orchestras, the third announcing the Board's declination of jurisdiction over racetracks, and the fourth clarifying the reinstatement rights of employees serving in the military at the time of a Board reinstatement rule."

It is the "rulings" rather than "rulemakings" which give the NLRB tremendous power over employers and employees. Last year alone the NLRB received over 53,000 new cases, so even the choice of which cases it will consider is important. Whether the concern is the "flip-flopping" of previous decisions, handing down rulings which accomplish what Congress couldn't legislate, or some other concern, NLRB needs the congressional oversight and public attention that all regulators do.

For more information, contact: Harold P. Coxson, Director of Labor Law, at (202) 659-6104. □

William H. Knapp and Arthur Rosenfeld, Labor Relations Attorneys for the U.S. Chamber, monitor the Dept. of Labor and other federal agencies whose jurisdiction includes employer-employee relations.

NLRB—Leaning to the Left?

by Arthur Rosenfeld

It's hard to remember a time when the National Labor Relations Board (NLRB) was not embroiled in controversy.

Prior to 1947, the NLRB was accused of acting as judge, jury, and prosecutor, a situation analagous to the judge's son being appointed as district attorney. This situation was corrected by Congress with the passage of the 1947 Taft-Hartley amendments to the National Labor Relations Act (NLRA), creating the Office of General Counsel, a prosecutorial position independent of the Board, and appointed by the President with Senate confirmation.

John Fanning's ascension in 1977 to the chairmanship of the NLRB brought with it an alarming shift in NLRB philosophy. Fanning is presently the most pro-union Board member, as his opinions in several cases such as *United Dairy Farmers*, *Gould Incorporated* and *K & K Construction Co.* clearly demonstrate. This trend has received attention in the federal courts, ordinarily not a repository of conservative viewpoints, which has been reversing Fanning's decisions with increasing frequency.

The NLRB's growing reputation as a biased pro-union federal agency now threatens to be further tarnished by a recent development. In the face of unanimous business sector objections decrying his lack of impartiality, independence and experience, William A. Lubbers has been nominated by President Carter to the position of General Counsel of NLRB.

Background

The job of the General Counsel is to investigate claims (by employees, employers, or unions) of violations of the labor law. If the General Counsel has reasonable cause to believe that a violation has occurred,

(continued on page 6)

- If a contractor makes available equal funds for all similarly situated employees there should be no basis for an alleged violation of the Executive Order.

What You Can Do

Submit your comments on the proposal to the OFCCP by March 24, 1980. Send copies to your elected representatives and to the Regulatory Action Center.

Agency contact: E. E. Mitchell, Director, Division of Program Policy, OFCCP (202) 523-9426

Chamber contact: William H. Knapp, Labor Relations Attorney (202) 659-6103

Federal Register: January 23, 1980, p. 4954

Write: OFCCP, Dept. of Labor, Washington, D.C. 20210 ☐

William A. Lubbers is President Carter's controversial choice to serve as General Counsel of the NLRB.

NLRB Controversy

(continued from page 5)

he issues an invitation (complaint) to the Board to consider the case. The Board cannot act unless it receives this invitation.

This responsibility invests enormous power over management and labor in the Office of General Counsel. The decision to issue, or not issue, a complaint, is unreviewable.

Business Speaks Out

Witnesses, including the U.S. Chamber of Commerce, testified at hearings on December 14, 1979 that after serving for over twenty years on the staff of John Fanning, the most pro-labor member of the Board, Lubbers lacks the required independence to serve as NLRB General Counsel.

Further, Lubbers lacks both administrative, and "in the field" labor relations experience, a requisite for one who must supervise thirty-three regional offices (where charges are initially brought) and over twenty-five hundred employees.

Finally, Lubbers lacks the requisite impartiality. At the hearings, Lubbers acknowledged offering "technical assistance" to union leaders at private meetings during last year's labor law "reform" battle, even though as an NLRB employee he should have remained neutral.

Now, in one of his first official acts as interim General Counsel, Mr. Lubbers substantiates the charges of pro-union bias.

In a dramatic reversal of position involving a key labor law question—the right of union members to resign from their union during a strike—the newly appointed General Counsel announced that a union rule forbidding resignation should be upheld.

Lubbers departed from the legal position taken by his predecessors when, on January 16, two attorneys on his staff argued before the five-member NLRB, in the Dalmo Victor Case, that union members may be fined by a union for mid-strike resignations. Previously, in the same case the Office of General Counsel had taken the position that "a labor organization has no statutory right to solidarity" and that "national policy is to make individual rights paramount." However, Lubbers adopted the union's argument that their implied right supercedes a dictate of the NLRA that an individual may *refrain* from union activity.

Action Needed

The right of a union to fine ex-members has never been definitively settled (in fact, the NLRB has held that a union doesn't have this right). The novel position taken by Mr. Lubbers, however, would preclude this determination, because the General Counsel has the unreviewable power to prevent claims from being heard by the Board or the courts. Thus, an individual employee would be unable to challenge the union fines, sometimes exceeding $2,200, even though there is legal precedent that the union violated the law.

The AFL-CIO has come out in full support of Lubbers pending confirmation, so it is up to the business community to counter this support by re-emphasizing to members of the U.S. Senate its total opposition to William A. Lubbers as a full term General Counsel.

For more information, contact: Arthur Rosenfeld, Labor Relations Attorney, U.S. Chamber (202) 659-6102. □

Mr. **Truesdale**. I like to think, Senator Hatch, remembering back to the beginning of my term, when you advised me to be fair—I would like to think that you will realize that that is a two-way street, and that when you look at the record of this hearing and you look at the body of my decisions, you will decide that, being perfectly fair, you will end up supporting my nomination.

Senator **Hatch**. Well, I did give you the benefit of a doubt back in 1977—and I recall our conversation right outside that door when I suggested that at that time I would not oppose your nomination and all I could ask of you was to be fair.

We have done extensive review of your case history, and I do have alarming questions concerning whether or not you have been unbiased or fair in this matter.

But I will certainly look at it further, and we will see where we go from here. And, of course, there are many others looking at it as well.

The **Chairman**. Thank you.

[The hearing adjourned at 1:25 p.m.]

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